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and

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U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 122

(T.D. 02–40)

RIN 1515–AD04

ACCESS TO CUSTOMS SECURITY AREAS AT AIRPORTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations; solicitation of comments.

SUMMARY: This document sets forth interim amendments to those provisions of the Customs Regulations that concern standards for employee access to Customs security areas at airports that accommodate international air commerce. The principal amendments set forth in this document involve the addition of a biennial access approval reapplication requirement, an expansion of the grounds for denial of an application for access, the addition of a requirement that each employee granted access must report to Customs certain changes in the employee's circumstances, the inclusion of several new employer responsibilities, an expansion of the grounds for revocation or suspension of access, the inclusion of separate procedures for immediate revocation or suspension of access and for proposed revocation or suspension of access, and a limitation of the opportunity to have a hearing in a revocation or suspension action to only cases in which there is a genuine issue regarding a material fact. These changes are needed to enhance the security environment at airports in Customs security areas and are commensurate with the heightened enforcement posture of the Federal Government following the September 11, 2001, terrorist attacks on the United States.

DATES: Interim rule effective July 29, 2002; comments must be submitted by September 27, 2002.

ADDRESSES: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Elizabeth Tritt, Passengers Programs, Office of Field Operations (202–927–0530).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 3, 1986, Customs published in the Federal Register (51 FR 4161) T.D. 86–12 setting forth an amendment to the Customs Regulations to require the use and display of a Customs-approved identification card, strip, or seal on identification cards worn by employees at airports accommodating international air commerce. This Customs-approved identification requirement applies to all persons (other than government law enforcement personnel) who are located at, or operate out of, or are employed by, affected airports and who request access to Customs security areas in order to perform functions associated with their employment. Those regulatory requirements were originally contained in § 6.12a of the Customs Regulations (19 CFR 6.12a) but are currently set forth as Subpart S of Part 122 of the Customs Regulations (19 CFR Part 122).

In the preamble portion of T.D. 86–12 Customs explained the need for, and purpose of, those regulatory provisions as follows: "Customs finds it necessary to improve integrity and security in authorized inspection areas, due in large measure to the recent sharp increases in threats to airport security posed by terrorist organizations. The current regulations in 19 CFR Part 6 are inadequate for controlling access to the Customs security areas to the extent necessary. The arrival of an aircraft from abroad necessitates the services of numerous persons representing various specialties, such as ground crews, refueling personnel, baggage handlers, and food service personnel, among others. While all of these persons may have legitimate business associated with the arrival of an international flight, Customs needs a method by which access to the aircraft and inspection areas will be restricted, as well as some assurance that the service personnel themselves have been found trustworthy by their employers. While the Federal Aviation Administration has general responsibility for security at airports, Customs has determined that it is necessary to amend 19 CFR Part 6 to provide Customs with the needed authority and procedures to achieve these goals at the areas under the Customs jurisdiction. The purpose of this amendment is to establish an identification system for all employees whose duties require access to Customs security areas at airports handling international air commerce, with the exception of uniformed Federal, State, and local law enforcement personnel. Because of recent terrorist incidents at foreign airports, threats of violence at U.S. airports, and in an effort to improve the security of these areas by restricting access to authorized employees, Customs will require that employees apply for a Customs approved identification strip or seal to be affixed to existing identification cards once an authorized official of the employer attests that background checks of employment history have been conducted. Customs will issue the identification strip or seal, once satisfied that the issuance of the

additional identification will neither endanger the revenue nor threaten the security of the entire security area (which may include the arriving airplane, ramp area, and Customs baggage and passenger inspection facilities)."

The regulatory provisions contained in Subpart S of Part 122 prior to the publication of this document consisted of §§ 122.181 through 122.188 (19 CFR 122.181 through 122.188) which may be summarized as follows:

Section 122.181 set forth a definition of the term "Customs security area;"

Section 122.182 set forth the basic identification card, strip, or seal requirement (paragraph (a)), outlined certain employer responsibilities (paragraph (b)), set forth identification card, strip, or seal application procedures and employer bond requirements (paragraph (c)), provided for background checks of applicants (paragraph (d)), provided for the issuance of identification cards, strips, or seals to law enforcement officers and other Federal, State, and local officials without applying the paragraph (c) and paragraph (d) requirements (paragraph (e)), prescribed standards for the issuance of replacement identification cards, strips, and seals (paragraph (f)), and set forth standards for notifying Customs and surrendering the identification card, strip, or seal when it was no longer needed (paragraph (g));

Section 122.183 dealt with the denial of applications for access and included provisions regarding grounds for denial (paragraph (a)), notification of denial (paragraph (b)), appeal of denial (paragraph (c)), and further appeal of denial (paragraph (d));

Section 122.184 provided for removal of the identification card, strip, or seal from the employee where, for security reasons, a change in the nature of the identification was necessary;

Section 122.185 required a prompt written report in the event of a loss or theft of an identification card, strip, or seal and provided for replacement in accordance with § 122.182(f);

Section 122.186 provided for the removal and destruction of an identification card, strip, or seal that was presented by a person other than the one to whom it was issued and also provided that an approved identification card, strip, or seal may be removed from an employee by any Customs officer designated by the port director;

Section 122.187 covered the revocation or suspension of access and included grounds for revocation or suspension (paragraph (a)), provided for giving notice of the revocation or suspension to the employee with a copy to the employer (paragraph (b)), permitted the employee to file a written notice of appeal and to request a hearing in the notice of appeal (paragraph (c)), set forth rules for the conduct of a hearing (paragraph (d)), permitted the employee to submit additional written views after the hearing had been held (paragraph (e)), and provided for issuance and service of the decision after the hearing (paragraph (f)); and

Section 122.188 concerned temporary identification cards, strips, and seals and included provisions regarding the conditions for issuance of a temporary card, strip, or seal (paragraph (a)), the period of validity of the temporary card, strip, or seal (paragraph (b)), the application of the section to temporary employees and official visitors (paragraph (c)), and the revocation of a temporary card, strip, or seal and denial of temporary access (paragraph (d)).

The Need For Increased Security Enforcement Measures

The September 11, 2001, terrorist attacks involving four U.S. commercial aircraft underscored the importance of a properly maintained security environment at the nation's airport facilities. The nature of the attacks, which involved the use of aircraft as weapons against persons and property in the United States, and the nature of the perpetrators, who are believed to be affiliated with a terrorist organization that has an almost global network and that has declared its opposition to U.S. foreign policy and presence in the Middle East and its intention to engage in further attacks against the United States, support the conclusion that there is now, if anything, an even greater need for security precautions at airports than there was when the regulations described above were promulgated.

On December 6, 2001, the Federal Aviation Administration (FAA) published in the Federal Register (66 FR 63474) a final rule document entitled "Criminal History Records Checks" which amended its regulations to require each airport operator and each aircraft operator that has adopted a security program under 14 CFR Part 107 or 14 CFR Part 108 to conduct fingerprint-based criminal history record checks (CHRCs) for individuals if they have not already undergone CHRCs. These FAA rules, which took effect on the date of publication, apply to those who either have, or apply for, (1) unescorted access authority to the Security Identification Display Area (SIDA) of an airport, (2) authority to authorize others to have unescorted access to the SIDA, and (3) passenger and carry-on property screening functions. In the background portion of this final rule document the FAA first noted the September 11, 2001, terrorist attacks and related potential threats to U.S. civil aviation. The FAA went on to explain that the new rules were necessary because the current employment investigation method was not adequate, in particular, because the present method did not require CHRCs for all individuals. The FAA also noted that, by requiring that all employees in the specified positions undergo a CHRC based on their fingerprints, there may be some individuals who now are in the covered positions who will be disqualified under the resulting new checks.

Following the September 11, 2001, terrorist attacks, Customs similarly initiated a review of the security standards and procedures that apply for purposes of access to the Customs security areas at airports that accommodate international air commerce. That review included, among other things, a review of the existing regulatory standards and an expanded fingerprinting and associated criminal record checks of individ-

uals currently having authorized access to a Customs security area. The review disclosed a number of problems that require immediate regulatory solutions in order to enable Customs to maintain an enhanced security environment at airports in those areas over which Customs must exercise some jurisdiction regarding access. The principal identified problem areas and solutions are as follows:

1. *Problem*: The grounds for denial of applications for access do not adequately reflect security considerations and, particularly as regards the applicant's criminal history, are not sufficiently specific. *Solution*: The regulations should contain, as a basis for denial of access, a general statement regarding risk to public health, interest or safety, national security, or aviation safety. In addition, the regulations should amplify the criminal history grounds for denial of access by including, for example, the detailed list of aircraft-related and other specific violations listed in 14 CFR 107.209 and 14 CFR 108.229 as published by the FAA in the December 6, 2001, final rule document referred to above.

2. *Problem*: The present regulations do not provide an adequate legal framework for ongoing security enforcement regarding the conduct of employees who have access to the Customs security area, particularly with regard to events that occur after the application for approved access has been granted. *Solution*: The regulations should (1) affirmatively state the obligation of the employee to use the approved access only in furtherance of his employment, (2) impose on an employee with approved access an ongoing obligation to inform Customs of any change in circumstances (for example an arrest or conviction) that would be a ground for denial or revocation or suspension of access and to inform Customs if the employee's access to the SIDA has been suspended under the FAA regulations, and (3) add as grounds for revocation or suspension of access a failure to comply with any of the foregoing requirements. In addition, the regulations should impose an obligation on the employer to report to Customs any change in an employee's circumstances that could affect his right to have access and also to ensure that each employee uses the approved access only in connection with his employment. A failure on the part of the employer to comply with these requirements could result in a claim for liquidated damages under the employer's bond.

3. *Problem*: The procedures for revocation or suspension of an employee's approved access to the Customs security area constitute an obstacle to enhanced security initiatives because they are inefficient, time consuming and burdensome, in principal part due to a provision in the regulations that gives the employee an absolute right to a hearing in connection with an appeal of a revocation or suspension action, even where there is no substantial issue of a material fact to be addressed at the hearing. At a number of locations where Customs performed fingerprinting and associated criminal record checks which disclosed grounds for a revocation or suspension action, in almost every case the affected employee requested a hearing, thus delaying the time at which the em-

ployee would lose access (and therefore extending the security risk) and straining the personnel and fiscal resources of Customs due to the costs associated with conducting a formal hearing. *Solution*: The regulations should (1) limit hearings on appeals to those cases in which there is a genuine issue of fact that is material to the revocation or suspension action, similar to the procedure used in courts of law whereby cases involving no issues of fact but rather only issues regarding the construction of the law are resolved in summary fashion on the written pleadings and without oral argument, (2) provide for issuance of access approval for a limited period of time and for reissuance only upon reapplication for a new period, with the new application (which may include fingerprinting and associated criminal record checks) being subject to *de novo* review, and (3) provide for immediate revocation or suspension of access in emergency situations involving public health, safety, or security, whether or not the affected employee would be entitled to a hearing upon appeal.

Accordingly, this document sets forth amendments to Subpart S of Part 122 of the Customs Regulations in order to address the problems discussed above, and the document also includes a number of other changes not related to security concerns that also represent improvements to those regulatory texts. Similar to the approach taken by the FAA in the December 6, 2001, final rule document referred to above, Customs believes that the immediate and ongoing significance of these security considerations requires that the regulatory amendments take effect on the date of publication in the Federal Register even though the document affords the public an opportunity to comment on the regulatory changes prior to publication of a final rule. The regulatory amendments are explained in more detail below except in the case of changes that involve merely minor, non-substantive wording changes.

Explanation of Regulatory Amendments

Before proceeding to a section-by-section discussion of the substantive amendments, it should be noted that throughout the texts the words "identification card, strip, or seal" and all variations of those words have been replaced by the words "Customs access seal" or "access seal." This change in terminology is simply intended to reflect current practice whereby, upon approval of an application for access to the Customs security area, Customs places a seal on a card or other identification medium issued either by Customs or by the airport authority, air carrier or other employer of the employee to whom access is granted.

Section 122.181

In the first sentence the words "or departing to" have been added after the words "arriving from" to clarify that the Customs security area also includes airport areas that accommodate outgoing aircraft.

Section 122.182

Paragraph (a) has been revised to incorporate the following changes:

1. In the first sentence, a reference to "aircraft passengers and crew" has been added to reflect the Customs practice of not requiring those persons to apply for approved access, because those persons normally pass through the Customs security area only when going to or from an aircraft.

2. The second sentence has been modified by the addition of a requirement that the approved Customs access seal must be used only in furtherance of the employment of the person in whose name it is issued, in accordance with the description of duties submitted by the employer under paragraph (c)(1) of the section, for the reason explained above.

3. In the third sentence, references to immediate surrender of a Customs access seal "as provided in paragraph (g) of the section" (that is, when the access seal is simply no longer needed by the employee) and "for any cause referred to in § 122.187(a)" (that is, in connection with a revocation or suspension action) have been added to clarify that there are two contexts under the regulations which provide for the surrender of a Customs access seal.

4. Two new sentences have been added at the end to prescribe a 2-year validity period for an approved Customs access seal and to provide for retention beyond the applicable 2-year period only if a new application is filed under paragraph (c)(2) of the section.

In paragraph (b), which concerns employers' responsibilities, the references to bond liability have been removed because they can be more appropriately dealt with elsewhere (see the discussion of new § 122.189 below).

Paragraph (c), which sets forth access application requirements, has also been revised in order to set forth the prior text as paragraph (c)(1) headed "initial application" and in order to add a new text as paragraph (c)(2) headed "reapplication." The following points are noted regarding the revised text:

1. In the first sentence of paragraph (c)(1), a requirement has been added regarding submission of a written request and justification for issuance prepared by the applicant's employer which must include a description of the duties to be performed by the employee while in the Customs security area. Customs believes that this requirement is necessary and appropriate because it (1) more clearly addresses the relationship of the applicant to the employer whose business affairs require the employee access, (2) provides additional relevant information to assist Customs in making an informed decision on the application, and (3) will assist Customs in monitoring the employee's activities within the Customs security area to determine whether they are necessary and proper.

2. At the end of paragraph (c)(1), a sentence has been added to cover the submission of fingerprints, proof of citizenship or residency, and a photograph. These requirements, which were previously in paragraph (d) (which concerns background checks), have been moved to this para-

graph because they are more directly related to the application submission process.

3. Paragraph (c)(2) sets forth requirements concerning the new reapplication procedure which must be initiated at least 30 days before the end of the 2-year approval validity period prescribed in paragraph (a) if the employee wishes to retain the approved Customs access seal beyond that 2-year period. The 30-days minimum reapplication period was chosen in order to ensure that Customs will have enough time to review and make a decision on the application before the current validity period lapses. This new paragraph (c)(2) provides that the new application must be filed in the same manner as that specified for an initial application under paragraph (c)(1), including the submission of fingerprints if required by the port director, and that the new application will be subject to a *de novo* review (which may include a background check) as if it were an initial application except that the employer's attestation under paragraph (d) will not be required if there has been no change in the applicant's employment.

Paragraph (d), which concerns background checks, has been revised in order to (1) remove the reference in the first sentence to employees hired on or after November 1, 1985, (2) remove the third sentence regarding employees hired before November 1, 1985, and (3) reflect the transfer of the fingerprint and proof of citizenship or residency provisions to paragraph (c) as discussed above. The removal of the provisions regarding the November 1, 1985, date is necessary because those provisions are out-of-date and because the effect of these provisions, which is to "grandfather-in" employees hired before that date as regards the type of employer attestation that must be made, is incompatible with the present heightened security enforcement posture of Customs as reflected in the other regulatory changes contained in this document. Customs further notes that those November 1, 1985, provisions also may not be compatible with the new background check requirements reflected in the December 6, 2001, FAA regulatory changes referred to above.

In paragraph (g), the first sentence (which provides that employers must give notice to Customs and surrender access seals to Customs when they are no longer needed by their employees) has been amended to also require notice and surrender where the 2-year approval validity period under paragraph (a) has expired and a new application under paragraph (c)(2) has not been approved, because Customs believes that this is also consistent with the principle that employers must bear some responsibility for ensuring the proper use of access seals by their employees, and the words "who no longer requires access" at the end of the second sentence have been removed to conform to the new wording of the first sentence. In addition, the penultimate sentence of the prior text (which concerned the filing of a summary of information regarding the disposition of access seals on a quarterly or other basis established by the port director) has been removed—see the discussion below regard-

ing new paragraph (c) of § 122.184. Finally, the last sentence of the prior text (which allowed an employee to return to duties in the Customs security area within 1 year without having to file an application under paragraph (c)) has been removed because Customs now believes that an application should be required in that case.

Section 122.183

Paragraph (a), which concerns grounds for the denial of access to the Customs security area, has been revised primarily in order to address the first principal problem area discussed earlier in this document. The following points are noted regarding the changes reflected in the revised text:

1. In the introductory text of the paragraph, the words "or pose an unacceptable risk to public health, interest or safety, national security, or aviation safety" have been added after the words "endanger the revenue or the security of the area."

2. In paragraph (a)(1), which refers to any cause which would justify suspension or revocation under § 122.187, references to "a demand for surrender" and to "§ 122.182(g)" have been added to clarify (1) that § 122.187 refers not only to suspension or revocation of access but also to the surrender of the access seal and (2) that the surrender of access seals is also the subject of § 122.182(g). With regard to the latter point, it is noted that under the amended texts a failure to surrender an access seal, if demanded by Customs because the new 2-year approval period has expired and no new application has been approved, would constitute a basis for denial under this provision.

3. In paragraph (a)(2), which under the prior paragraph (a) text was the only other listed ground for denial and referred specifically to evidence of a pending or past investigation which establishes criminal, or dishonest conduct, or a verified record of such conduct, the words "which establishes * * * such conduct" have been replaced by the words "establishing probable cause to believe that the applicant has engaged in any conduct which relates to, or which could lead to a conviction for, a disqualifying offense listed under paragraph (a)(4) of this section." This wording change was made in consideration of the addition of new paragraph (a)(4) discussed below, and it is noted in this regard that, with the addition of that new paragraph and new paragraph (a)(3) discussed below, the "probable cause" standard appears to be more appropriate in the instant context.

4. A new paragraph (a)(3) has been added which refers to a case in which an applicant has been arrested for, or charged with, a disqualifying offense listed under paragraph (a)(4) and disposition of the arrest or charge is pending. Customs believes that this paragraph is necessary to fill in the gap between the investigation stage described in revised paragraph (a)(2) and the disqualifying offense stage described in new paragraph (a)(4). It is also noted that the FAA regulations adopted in the December 6, 2001, final rule document referred to above contain provi-

sions of similar effect (see 14 CFR 107.209(g)(1) and 14 CFR 108.229(g)(1)).

5. A new paragraph (a)(4) has been added which lists, as grounds for denial, disqualifying offenses which an applicant has been convicted of, or found not guilty of by reason of insanity, or has committed any act or omission involving, during the preceding 5-year period (or any longer period as may be appropriate in a specific case) prior to the application or at any time while in possession of a Customs access seal. This paragraph was added to § 122.183 because Customs believes that the issue of established criminal conduct is appropriate for detailed treatment in an application context, and it is noted that under the prior Part 122 texts specific felony or misdemeanor conviction references were contained only in the context of revocation or suspension actions under § 122.187. The paragraph parallels the FAA approach reflected in the December 6, 2001, final rule document in referring to a "disqualifying" offense, in covering applicants found not guilty by reason of insanity, in referring to offenses both in the pre-application period and while having approved access, and in setting forth a detailed list of specific disqualifying offenses, including a number of offenses relating directly to aircraft under Title 49 of the United States Code, for which access may be denied (see 14 CFR 107.209(d) and 14 CFR 108.229(d)). Customs believes that it is useful, wherever practicable, to use similar standards as those of the FAA since the need to address security concerns at airports is universal and the same people will be given access to areas at airports that are concentric or overlapping under the separate approval regimes of the two agencies. However, because the mission of Customs is not in all cases the same as that of the FAA, the new paragraph (a)(4) text also lists some additional offenses not included in the FAA regulations, including offenses that relate directly to a Customs statutory enforcement mandate.

6. A new paragraph (a)(5) has been added which sets forth as a ground for denial the fact that an applicant was denied unescorted access authority to an SIDA, or had his unescorted access authority to an SIDA suspended, pursuant to regulations of the FAA or other government agency. As in the case of new paragraph (a)(4) discussed above, this provision reflects the fact that there are security considerations that are common to Customs and to the FAA. Accordingly, if the FAA denies an application for unescorted access to an SIDA or suspends a person's access to an SIDA and Customs is aware of the FAA action, Customs must deny that person's application for access to the Customs security area because (1) the basic security concerns reflected in the FAA action would also apply in a Customs security area context and (2) granting the application, and thus allowing the person into the Customs security area, would be incompatible with the FAA action from an operational standpoint.

7. Finally, a new paragraph (a)(6) has been added to set forth as a ground for denial the fact that neither the employer nor Customs is able to complete a meaningful background check or investigation of the ap-

plicant because relevant records do not exist or are not available. Customs believes that this provision is necessary because the granting of an application should represent a knowledgeable, informed decision and thus should not be made in circumstances where there is a lack of relevant records. Thus, for example, an application could be denied if the applicant has not lived in the United States for a period of time sufficiently long for Customs to make a meaningful verification of any U.S. criminal history and a similar records check in the applicant's prior country of residence cannot be made.

In paragraph (c), which concerns the appeal of a denial, the last sentence has been revised to require the port director to advise the applicant of the procedures for filing a further appeal if the application is denied on appeal.

Paragraph (d), which concerns the further appeal of a denial, has been revised primarily in order to replace the references to the Commissioner (or his designee) with references to the director of field operations at the Customs Management Center having jurisdiction over the office of the port director who denied the application under paragraph (b) and considered the first appeal under paragraph (c). Thus, the further appeal of the denial would no longer be considered at Customs Headquarters in Washington, D.C.

Section 122.184

The section heading has been revised and the prior section text has been designated as paragraph (a) in order to accommodate the addition of new paragraphs (b) and (c).

New paragraph (b), which is headed "change in circumstances of employee," imposes on an employee who has approved access to the Customs security area an obligation to advise the port director in writing in the following cases: (1) within 24 hours, if a circumstance arises that constitutes a ground for denial of access or for revocation or suspension of access and surrender of the employee's Customs access seal; (2) within 5 calendar days, if the employee was arrested or prosecuted for a disqualifying offense and there is a final disposition of that arrest or prosecution; and (3) within 24 hours, if the employee's unescorted access authority to an SIDA is suspended pursuant to the regulations of the FAA or other government agency. Customs believes that these new requirements, which impose an ongoing obligation on the part of each person granted access to the Customs security area to advise Customs of changes that might affect that person's access privilege, are appropriate and necessary for the security of the areas under Customs control. Customs also notes that a similar ongoing reporting requirement regarding disqualifying offenses is contained in the FAA regulations adopted in the December 6, 2001, final rule document referred to above (see 14 CFR 107.209(l)(2) and 14 CFR 108.229(l)(2)).

New paragraph (c), which is headed "additional employer responsibilities," sets forth employer responsibilities that are in addition to those specified for employers under § 122.182. The first sentence requires an

employer to report to Customs any known change in an employee's circumstances referred to in new paragraph (b), even if the employee also reports it under paragraph (b); even though this results in a duplicate reporting requirement, Customs believes that this result is justifiable because the overriding consideration is that Customs must have the information in question in order to properly assess the security risk and thus should not have to decide whether one possible source of the information is more appropriate than another. The second and third sentences set forth a quarterly reporting requirement regarding employees who have an approved access seal, including additions to and deletions from the previous report, and in effect replace the quarterly reporting requirement which has been removed from paragraph (g) of § 122.182 as discussed above. The fourth and final sentence, which requires each employer to take appropriate steps to ensure that an employee uses an approved Customs access seal only for employment-related purposes, is a corollary to the employee requirement added to the second sentence of paragraph (a) of § 122.182 as discussed above.

Section 122.187

Paragraph (a), which concerns the grounds for revocation or suspension of access to the Customs security area, has been divided into two subparagraphs, with paragraph (a)(1) constituting an expanded general statement regarding revocation or suspension and paragraph (a)(2) setting forth revised specific grounds for revocation or suspension. The following points are noted regarding the revised paragraph (a) texts:

1. Paragraph (a)(1)(i) requires the port director to immediately revoke or suspend an employee's access to the Customs security area and demand the immediate surrender of the employee's approved Customs access seal for any ground specified in paragraph (a)(2).

2. Paragraph (a)(1)(ii) authorizes the port director to propose the revocation or suspension of an employee's access to the Customs security area and the surrender of the employee's approved Customs access seal whenever in the judgment of the port director it appears, for any ground not specified in paragraph (a)(2), that continued access might "pose an unacceptable risk to public health, interest or safety, national security, aviation safety, the revenue, or the security of the area." The quoted language parallels the wording of the introductory text of revised paragraph (a) of § 122.183 regarding access application denials and in effect replaces prior paragraph (a)(4) of § 122.187 which referred to a circumstance in which continuation of privileges would "endanger the revenue or security of the area."

3. Paragraph (a)(2)(i) refers to an approved Customs access seal obtained through fraud or the misstatement of a material fact and thus corresponds to prior paragraph (a)(1). However, a reference to "probable cause to believe" has been added to the text because, given the priority that must be given to matters involving airport security, Customs believes that probable cause to believe (rather than actual proof of the fact) is the proper standard. Customs further notes in this regard

that an employee's rights can be appropriately protected by the appeal procedure which affords the employee an opportunity to have a hearing if there is a genuine issue of fact that is material to the action taken by Customs.

4. Paragraph (a)(2)(ii) refers to employees convicted of crimes and thus corresponds to prior paragraph (a)(2). However, the new text differs from the prior text by (1) including a reference to an employee "found not guilty by reason of insanity," (2) including "probable cause to believe" language, and (3) replacing the recitation of specific crimes by a cross-reference to "an offense listed in § 122.183(a)(4)." This text reflects the view of Customs that the commission of any "disqualifying offense" on which a denial of an application for access may be based under revised paragraph (a) of § 122.183 also should be a basis for revocation or suspension of access and surrender of the Customs access seal under § 122.187.

5. Paragraph (a)(2)(iii), which has no counterpart in the prior texts, refers to an employee who has been arrested for, or charged with, an offense listed in § 122.183(a)(4) and prosecution or other disposition of the arrest or charge is pending. It thus parallels the application denial terms of new paragraph (a)(3) of § 122.183.

6. Paragraph (a)(2)(iv), which has no counterpart in the prior texts, refers to an employee who has engaged in any other conduct (that is, conduct other than that covered by paragraph (a)(2)(ii) or (iii)) that would constitute a ground for denial of an application for access under § 122.183. This provision is the necessary counterpart of paragraph (a)(1) of § 122.183 in that it reflects the position of Customs that any ground for denial of an application for access to the Customs security area should also constitute a valid basis for revocation or suspension of access and surrender of the Customs access seal under § 122.187.

7. Paragraph (a)(2)(vi), which has no counterpart in the prior texts, refers to an employee who uses the approved access seal in connection with a matter not related to his employment or not constituting a duty described in the employer justification required by paragraph (c)(1) of § 122.182. This provision relates specifically to the employee requirement regarding proper use of the access seal which was added to the second sentence of paragraph (a) of § 122.182 as discussed above.

8. In paragraph (a)(2)(viii), which corresponds to prior paragraph (a)(6) and concerns bond sufficiency, the words "for all employees of the bond holder" have been added at the beginning of the text to clarify that, in the context of a revocation or suspension of access, bond sufficiency relates to all employees of the principal on the bond (that is, the employer) rather than to only one individual employee.

9. Paragraph (a)(2)(x), which has no counterpart in the prior texts, refers to the failure of an employee or employer to notify Customs of a change in circumstances under new paragraph (b) or (c) of § 122.184 and the failure of an employee to report the loss or theft of a Customs access seal as required by § 122.185.

Paragraph (b), which concerns the notice of revocation or suspension, represents a significant expansion of the prior text in order to address some of the principal problems mentioned earlier in this document. The changes involve both a modification of the prior paragraph (b) text and the addition of two new paragraphs (b)(1) and (b)(2). The following points are noted regarding these changes:

1. With regard to the prior text, which has become the introductory text of paragraph (b), a reference to demanding surrender of the Customs access seal has been added in the first sentence because this is an integral part of a revocation or suspension action. In addition, the text has been shortened and at the end provides that the notice of revocation or suspension will indicate whether the action is effective immediately or is proposed.

2. New paragraph (b)(1), which is headed "immediate revocation or suspension," provides that the port director will issue a final notice of revocation or suspension when the revocation or suspension of access and surrender of the Customs access seal are effective immediately. The paragraph also allows the port director or his designee to deny physical access to the Customs security area and demand surrender of an approved Customs access seal at any time on an emergency basis prior to issuance of a final notice of revocation or suspension whenever in his judgment an emergency situation involving public health, safety, or security is involved. In the latter case, a final notice of revocation or suspension would be issued to the affected employee within 10 days of the emergency action. The text also provides that the final notice of revocation or suspension issued under this paragraph will state the specific grounds for the immediate action, will direct the employee to immediately surrender the access seal if he has not already done so, and will advise the employee that he may pursue one of the following two options: (1) submit a new application for a Customs access seal on or after the 180th day after the date of the final notice of revocation or suspension; or (2) file a written administrative appeal with the port director in accordance with paragraph (c) within 30 days of the date of the final notice of revocation or suspension. Finally, the text provides that, if the employee chooses to appeal, the appeal may request that a hearing be held in accordance with paragraph (d) but in that case must demonstrate that there is a genuine issue of fact that is material to the revocation or suspension action. These new provisions regarding immediate revocation or suspension have been included to address one of the security and related concerns outlined in the third principal problem area mentioned earlier in this document.

3. New paragraph (b)(2), which is headed "proposed revocation or suspension," is the alternative to an immediate action under paragraph (b)(1). Paragraph (b)(2)(i) concerns issuance of the notice of proposed revocation or suspension and provides that the notice will state the specific grounds for the proposed action, will inform the employee that he may continue to have access to the Customs security area and retain his

access seal pending issuance of a final notice under paragraph (b)(2)(ii), and will advise the employee that he may file a written response with the port director within 10 days and may ask for a meeting with the port director to discuss the proposed action. Paragraph (b)(2)(ii) concerns the issuance of a notice of final determination regarding the employee's right of access to the Customs security area. It provides that if the employee does not respond to the notice of proposed action, or if the employee files a timely response and the port director's final determination is adverse to the employee, the port director will issue a final notice of revocation or suspension within 30 days of the notice of proposed action, or within 30 days of receipt of the employee's response, which states the specific grounds for the action, directs the employee to immediately surrender the Customs access seal, and advises the employee that he may choose to pursue one of the two options specified under paragraph (b)(1), that is, reapplication or appeal. These paragraph (b)(2) provisions are not directly related to the security concerns that are the primary focus of this document, but Customs believes that they represent a distinct due process improvement over the prior proposed revocation or suspension notice procedures.

Paragraph (c), which concerns appeal procedures, represents a significant expansion of the prior text primarily in order to address the appeal hearing issue referred to in the third principal problem area outlined earlier in this document. The changes involve redesignation of the prior paragraph (c) text as paragraph (c)(1) with the heading "filing of appeal" and the addition of two new paragraphs (c)(2) and (c)(3). The following points are noted regarding redesignated paragraph (c)(1) and new paragraphs (c)(2) and (c)(3):

1. In redesignated paragraph (c)(1), the last sentence regarding requesting an hearing in the notice of appeal has been replaced by a new sentence that gives the port director discretion to allow more time for the employee to submit information in support of the appeal.

2. New paragraph (c)(2), which is headed "action by the port director," provides that if the appellant requests a hearing, the port director will first review the appeal to determine whether there is a genuine issue of fact that is material to the revocation or suspension action. If a hearing is required because the port director finds that there is a genuine issue of fact that is material to the revocation or suspension action, a hearing will be held, and a decision on the appeal will be rendered, in accordance with paragraphs (d) through (f). On the other hand, if no hearing is requested or if a requested hearing is not required, no hearing will be held and the port director will forward the administrative record, together with the port director's response to any statements made in the notice of appeal, to the director of field operations at the Customs Management Center having jurisdiction over the office of the port director for a decision on the appeal under paragraph (c)(3).

3. New paragraph (c)(3), which is headed "action by the director," provides for issuance of a written decision on the appeal by the director of

field operations within 30 days based on the administrative record forwarded by the port director under paragraph (c)(2). The paragraph provides for transmittal of the decision to the port director for service on the employee and states that the decision on the appeal will constitute the final administrative action on the matter.

In paragraph (d), which concerns hearing procedures, a new sentence has been added at the beginning to restate the rule regarding when a hearing will be held, that is, only when requested in an appeal and only if the affected employee demonstrates that there is a genuine issue of fact that is material to the revocation or suspension action. In addition, except as regards designation of the hearing officer, all references to "the Commissioner or his designee" have been replaced by references to "the director of field operations" who will receive the appropriate record from the hearing officer for purposes of rendering a decision on the appeal.

The following changes have been made to paragraph (e) which provides for the submission of additional written views following the hearing: (1) references to the Commissioner or his designee in the prior text have been replaced by references to the director of field operations; (2) the words "the employee" in the prior text have been replaced by "either party" because Customs believes that both the employee and the government should have the opportunity to submit additional written views; (3) a sentence has been added to require that a copy of a submission be provided to the other party; and (4) two sentences have been added at the end to provide that the other party may within 10 days file a reply to a submission with the director of field operations, with a copy being provided to the other party, and to provide that no further submissions will be accepted. These changes have been included for due process or other procedural purposes and are not related to the security concerns addressed elsewhere in this document.

In paragraph (f), which concerns issuance of the decision after a hearing, the first sentence has been changed by the addition of a reference to consideration of "any additional written submissions and replies made under paragraph (e)" and by providing that the decision will be made by the director of field operations rather than by the Commissioner or his designee. In addition, a sentence has been added at the end stating that a decision on an appeal rendered under that paragraph will constitute the final administrative action on the matter. These procedural changes are also not related to security concerns.

New § 122.189

This new section, which is headed "bond liability," is intended to clarify that a principal may face consequences for a failure to comply with the conditions of the bond required under § 122.182(c) which include an obligation to comply with the Customs Regulations applicable to Customs security areas at airports. This new section refers specifically to an employer because an employer would be a principal on the bond to whom

specific requirements apply under § 122.182(b) and under new § 122.184(c).

COMMENTS

Before adopting this interim regulation as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this interim rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Office of Regulations and Rulings, U.S. Customs Service, 799 9th Street N.W., Washington, D.C. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS AND THE REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of 5 U.S.C. 553(b)(B), Customs has determined that prior public notice and comment procedures on these regulations are unnecessary and contrary to the public interest. The regulatory changes contained in this document are primarily intended to enhance the security environment at airports in those areas designated as Customs security areas. The amendments promote public safety and airport security and therefore are in the public interest. For the same reasons, pursuant to the provisions of 5 U.S.C. 553(d)(3), Customs finds that there is good cause for dispensing with a delayed effective date. Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

PAPERWORK REDUCTION ACT

This regulation is being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in this regulation has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1515–0026.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collection of information in these interim regulations is in § 122.182. This information is used by Customs to determine whether an individual's application for access to a Customs security area should

be granted, to monitor current use of the access privilege by individuals, to determine whether an individual has engaged in conduct that might warrant revocation or suspension of access, and to determine whether access should be granted on a temporary basis. The likely respondents are individuals and business organizations including aircraft operators, airport operators, and subcontractors of aircraft and airport operators.

Estimated annual reporting and/or recordkeeping burden: 9,750 hours.

Estimated average annual burden per respondent/recordkeeper: 13 minutes.

Estimated number of respondents and/or recordkeepers: 30,000.

Estimated annual frequency of responses: 1.5.

Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer of the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503. A copy should also be sent to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, D.C. 20229. Comments should be submitted within the time frame that comments are due regarding the substance of the interim regulations.

Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or startup costs and costs of operations, maintenance, and purchase of services to provide information.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 122

Administrative practice and procedure, Air carriers, Aircraft, Airports, Air transportation, Bonds, Customs duties and inspection, Penalties, Reporting and recordkeeping requirements, Security measures, Surety bonds.

AMENDMENTS TO THE REGULATIONS

For the reasons set forth in the preamble, Part 122, Customs Regulations (19 CFR Part 122), is amended as set forth below.

PART 122—AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a.

2. In § 122.181, the first sentence is amended by adding after the words "arriving from" the words ", or departing to,".

3. In § 122.182:

a. Paragraph (a) is revised;

b. Paragraph (b) is amended by removing the words "and liability" in the paragraph heading and by removing the last sentence;

c. Paragraphs (c) and (d) are revised;

d. The first sentence of paragraph (e) is amended by removing the words "identification card, strip, or seal" and adding, in their place, the words "Customs access seal";

e. Paragraph (f) is amended by removing the word "identification" in the paragraph heading and adding, in its place, the words "access seal", by removing the words "identification card, strip or seal" in the introductory text and adding, in their place, the words "Customs access seal", and by removing the words "identification card, strip, or seal" in paragraph (f)(4) and adding, in their place, the words "Customs access seal"; and

f. Paragraph (g) is amended by removing the word "cards" in the paragraph heading and adding, in its place, the words "access seal", by adding the words "or where the 2-year period referred to in paragraph (a) of this section expires and a new application under paragraph (c)(2) of this section has not been approved," in the first sentence after the words "or other reason,", by removing the words "identification card, strip, or seal" in the first and second sentences and adding, in their place, the words "Customs access seal", by removing the words "who no longer requires access" at the end of the second sentence, and by removing the last two sentences.

The revisions read as follows:

§ 122.182 Security provisions.

(a) *Customs access seal required.* With the exception of all Federal and uniformed State and local law enforcement personnel and aircraft passengers and crew, all persons located at, operating out of, or employed by any airport accommodating international air commerce or its tenants or contractors, including air carriers, who have unescorted access to the Customs security area, must openly display or produce upon demand an approved access seal issued by Customs. The approved Customs access seal must be in the possession of the person in whose name it is issued whenever the person is in the Customs security area and must be used only in furtherance of that person's employment in accordance with the description of duties submitted by the employer under paragraph (c)(1) of this section. The Customs access seal remains the property of Customs, and any bearer must immediately surrender it as provided in

paragraph (g) of this section or upon demand by any authorized Customs officer for any cause referred to in § 122.187(a). Unless surrendered pursuant to paragraph (g) of this section or § 122.187, each approved Customs access seal issued under paragraph (c)(1) of this section will remain valid for 2 years from January 1, 2002, in the case of a Customs access seal issued prior to that date and for 2 years from the date of issuance in all other cases. Retention of an approved Customs access seal beyond the applicable 2-year period will be subject to the reapplication provisions of paragraph (c)(2) of this section.

* * * * * * *

(c) *Application requirements*—(1) *Initial application.* An application for an approved Customs access seal, as required by this section, must be filed by the applicant with the port director on Customs Form 3078 and must be supported by a written request and justification for issuance prepared by the applicant's employer that describes the duties that the applicant will perform while in the Customs security area. The application requirement applies to all employees required to display an approved Customs access seal by this section, regardless of the length of their employment. The application must be supported by the bond of the applicant's employer or principal on Customs Form 301 containing the bond conditions set forth in § 113.62, § 113.63, or § 113.64 of this chapter, relating to importers or brokers, custodians of bonded merchandise, or international carriers. If the applicant's employer is not the principal on a Customs bond on Customs Form 301 for one or more of the activities to which the bond conditions set forth in § 113.62, § 113.63, or § 113.64 relate, the application must be supported by an Airport Customs Security Area Bond, as set forth in appendix A of part 113 of this chapter. The latter bond may be waived, however, for State or local government-related agencies in the discretion of the port director. Waiver of this bond does not relieve the agency in question or its employees from compliance with all other provisions of this subpart. In addition, in connection with an application for an approved Customs access seal under this section:

(i) The port director may require the applicant to submit fingerprints on form FD–258 or on any other approved medium either at the time of, or following, the filing of the application. If required, the port director will inform the applicant of the current Federal Bureau of Investigation user fee for conducting fingerprint checks and the Customs administrative processing fee, the total of which must be tendered by, or on behalf of, the applicant with the application; and

(ii) Proof of citizenship or authorized residency and a photograph may also be required.

(2) *Reapplication.* If a person wishes to retain an approved Customs access seal for one or more additional 2-year periods beyond the 2-year period referred to in paragraph (a) of this section, that person must submit a new application no later than 30 calendar days prior to the start of each additional period. The new application must be filed in the manner

specified in paragraph (c)(1) of this section for an initial application, and the port director may also require the submission of fingerprints as provided in paragraph (c)(1)(i) of this section. The new application will be subject to review on a de novo basis as if it were an initial application except that the written attestation referred to in paragraph (d) of this section will not be required if there has been no change in the employment of the applicant since the last attestation was submitted to Customs.

(d) *Background check.* An authorized official of the employer must attest in writing that a background check has been conducted on the applicant, to the extent allowable by law. The background check must include, at a minimum, references and employment history, to the extent necessary to verify representations made by the applicant relating to employment in the preceding 5 years. The authorized official of the employer must attest that, to the best of his knowledge, the applicant meets the conditions necessary to perform functions associated with employment in the Customs security area. Additionally, the application may be investigated by Customs and a report prepared concerning the character of the applicant. Records of background investigations conducted by employers must be retained for a period of one year following cessation of employment and made available upon request of the port director.

* * * * * * *

4. In § 122.183, paragraph (a), the last sentence of paragraph (c), and paragraph (d) are revised to read as follows:

§ 122.183 Denial of access.

(a) *Grounds for denial.* Access to the Customs security area will not be granted, and therefore an approved Customs access seal will not be issued, to any person whose access to the Customs security area will, in the judgment of the port director, endanger the revenue or the security of the area or pose an unacceptable risk to public health, interest or safety, national security, or aviation safety. Specific grounds for denial of access to the Customs security area include, but are not limited to, the following:

(1) Any cause which would justify a demand for surrender of a Customs access seal or the revocation or suspension of access under § 122.182(g) or § 122.187;

(2) Evidence of a pending or past investigation establishing probable cause to believe that the applicant has engaged in any conduct which relates to, or which could lead to a conviction for, a disqualifying offense listed under paragraph (a)(4) of this section;

(3) The arrest of the applicant for, or the charging of the applicant with, a disqualifying offense listed under paragraph (a)(4) of this section on which prosecution or other disposition is pending;

(4) A disqualifying offense committed by the applicant. For purposes of this paragraph, an applicant commits a disqualifying offense if the applicant has been convicted of, or found not guilty of by reason of insanity,

or has committed any act or omission involving, any of the following in any jurisdiction during the 5-year period, or any longer period that the port director deems appropriate for the offense in question, prior to the date of the application submitted under § 122.182 or at any time while in possession of an approved Customs access seal:

(i) Forgery of certificates, false marking of aircraft, and other aircraft registration violation (49 U.S.C. 46306);

(ii) Interference with air navigation (49 U.S.C. 46308);

(iii) Improper transportation of a hazardous material (49 U.S.C. 46312);

(iv) Aircraft piracy in the special aircraft jurisdiction of the United States (49 U.S.C. 46502(a));

(v) Interference with flight crew members or flight attendants (49 U.S.C. 46504);

(vi) Commission of certain crimes aboard aircraft in flight (49 U.S.C. 46506);

(vii) Carrying a weapon or explosive aboard aircraft (49 U.S.C. 46505);

(viii) Conveying false information and threats (49 U.S.C. 46507);

(ix) Aircraft piracy outside the special aircraft jurisdiction of the United States (49 U.S.C. 46502(b));

(x) Lighting violations involving transportation of controlled substances (49 U.S.C. 46315);

(xi) Unlawful entry into an aircraft or airport area that serves air carriers or foreign air carriers contrary to established security requirements (49 U.S.C. 46314);

(xii) Destruction of an aircraft or aircraft facility (18 U.S.C. 32);

(xiii) Murder;

(xiv) Assault with intent to murder;

(xv) Espionage;

(xvi) Sedition;

(xvii) Kidnapping or hostage taking;

(xviii) Treason;

(xix) Rape or aggravated sexual abuse;

(xx) Unlawful possession, use, sale, distribution, or manufacture of an explosive or weapon;

(xxi) Extortion;

(xxii) Armed or felony unarmed robbery;

(xxiii) Distribution of, or intent to distribute, a controlled substance;

(xxiv) Felony arson;

(xxv) Felony involving:

(A) A threat;

(B) Willful destruction of property;

(C) Importation or manufacture of a controlled substance;

(D) Burglary;

(E) Theft;

(F) Dishonesty, fraud, or misrepresentation;

(G) Possession or distribution of stolen property;

(H) Aggravated assault;

(I) Bribery; or

(J) Illegal possession of a controlled substance punishable by a maximum term of imprisonment of more than one year;

(xxvi) Violence at an airport serving international civil aviation (18 U.S.C. 37);

(xxvii) Embezzlement;

(xxviii) Perjury;

(xxix) Robbery;

(xxx) Crimes associated with terrorist activities;

(xxxi) Sabotage;

(xxxii) Assault with a deadly weapon;

(xxxiii) Illegal use or possession of firearms or explosives;

(xxxiv) Any violation of a U.S. immigration law;

(xxxv) Any violation of a Customs law or any other law administered or enforced by Customs involving narcotics or controlled substances, commercial fraud, currency or financial transactions, smuggling, failure to report, or failure to declare;

(xxxvi) Airport security violations; or

(xxxvii) Conspiracy or attempt to commit any of the offenses or acts referred to in paragraphs (a)(4)(i) through (a)(4)(xxxv) of this section;

(5) Denial or suspension of the applicant's unescorted access authority to a Security Identification Display Area (SIDA) pursuant to regulations promulgated by the U.S. Federal Aviation Administration or other appropriate government agency; or

(6) Inability of the applicant's employer or Customs to complete a meaningful background check or investigation of the applicant.

* * * * * * *

(c) * * * The port director will render his decision on the appeal to the applicant in writing within 30 calendar days of receipt of the notice of appeal and, if the application is denied on appeal, the decision will advise the applicant of the procedures for filing a further appeal pursuant to paragraph (d) of this section.

(d) *Further appeal of denial.* Where the application on appeal is denied by the port director, the applicant may file a further written notice of appeal with the director of field operations at the Customs Management Center having jurisdiction over the office of the port director within 10 calendar days of receipt of the port director's decision on the appeal. The further notice of appeal must be filed in duplicate and must set forth the response of the applicant to the decision of the port director. The director of field operations will review the appeal and render a written decision. The final decision will be transmitted to the port director and served by him on the applicant.

5. Section 122.184 is revised to read as follows:

§ 122.184 Change of identification; change in circumstances of employee; additional employer responsibilities.

(a) *Change of identification.* The Customs access seal may be removed from the employee by the port director where, for security reasons, a change in the nature of the identification card or other medium on which it appears is necessary.

(b) *Change in circumstances of employee.* If, after issuance of a Customs access seal to an employee, any circumstance arises (for example, an arrest or conviction for a disqualifying offense) that constitutes a ground for denial of access to the Customs security area under § 122.183(a) or for revocation or suspension of access to the Customs security area and surrender of the Customs access seal under § 122.187(a), the employee must within 24 hours advise the port director in writing of that change in circumstance. In the case of an arrest or prosecution for a disqualifying offense listed in § 122.183(a)(4), the employee also must within 5 calendar days advise the port director in writing of the final disposition of that arrest or prosecution. In addition, if an airport operator or an aircraft operator suspends an employee's unescorted access authority to a Security Identification Display Area pursuant to regulations promulgated by the U.S. Federal Aviation Administration or other appropriate government agency and the employee also has an approved Customs access seal, the employee must within 24 hours advise the port director in writing of the fact of, and basis for, the suspension.

(c) *Additional employer responsibilities.* If an employer becomes aware of any change in the circumstances of its employee as described in paragraph (b) of this section, the employer must immediately advise the port director of that fact even though the employee may have separately reported that fact to the port director under paragraph (b) of this section. In addition, each employer must submit to the port director during the first month of each calendar quarter a report setting forth a current list of all its employees who have an approved Customs access seal. The quarterly report must list separately all additions to, and deletions from, the previous quarterly report. Moreover, each employer must take appropriate steps to ensure that an employee uses an approved Customs access seal only in connection with activities relating to his employment.

6. Section 122.185 is revised to read as follows:

§ 122.185 Report of loss or theft of Customs access seal.

The loss or theft of an approved Customs access seal must be promptly reported in writing by the employee to the port director. The Customs access seal may be replaced, as provided in § 122.182(f).

7. Section 122.186 is revised to read as follows:

§ 122.186 Presentation of Customs access seal by other person.

If an approved Customs access seal is presented by a person other than the one to whom it was issued, the Customs access seal will be removed and destroyed. An approved Customs access seal may be removed from an employee by any Customs officer designated by the port director.

8. Section 122.187 is revised to read as follows:

§ 122.187 Revocation or suspension of access.

(a) *Grounds for revocation or suspension of access*—(1) *General*. The port director:

(i) Must immediately revoke or suspend an employee's access to the Customs security area and demand the immediate surrender of the employee's approved Customs access seal for any ground specified in paragraph (a)(2) of this section; or

(ii) May propose the revocation or suspension of an employee's access to the Customs security area and the surrender of the employee's approved Customs access seal whenever, in the judgment of the port director, it appears for any ground not specified in paragraph (a)(2) of this section that continued access might pose an unacceptable risk to public health, interest or safety, national security, aviation safety, the revenue, or the security of the area. In this case the port director will provide the employee with an opportunity to respond to the notice of proposed action.

(2) *Specific grounds*. Access to the Customs security area will be revoked or suspended, and surrender of an approved Customs access seal will be demanded, in any of the following circumstances:

(i) There is probable cause to believe that an approved Customs access seal was obtained through fraud, a material omission, or the misstatement of a material fact;

(ii) The employee is or has been convicted of, or found not guilty of by reason of insanity, or there is probable cause to believe that the employee has committed any act or omission involving, an offense listed in § 122.183(a)(4);

(iii) The employee has been arrested for, or charged with, an offense listed in § 122.183(a)(4) and prosecution or other disposition of the arrest or charge is pending;

(iv) The employee has engaged in any other conduct that would constitute a ground for denial of access to the Customs security area under § 122.183;

(v) The employee permits the approved Customs access seal to be used by any other person or refuses to openly display or produce it upon the proper demand of a Customs officer;

(vi) The employee uses the approved Customs access seal in connection with a matter not related to his employment or not constituting a duty described in the written justification required by § 122.182(c)(1);

(vii) The employee refuses or neglects to obey any proper order of a Customs officer, or any Customs order, rule, or regulation;

(viii) For all employees of the bond holder, if the bond required by § 122.182(c) is determined to be insufficient in amount or lacking sufficient sureties, and a satisfactory new bond with good and sufficient sureties is not furnished within a reasonable time;

(ix) The employee no longer requires access to the Customs security area for an extended period of time at the airport of issuance because of a change in duties, termination of employment, or other reason; or

(x) The employee or employer fails to provide the notification of a change in circumstances as required under § 122.184(b) or (c) or the employee fails to report the loss or theft of a Customs access seal as required under § 122.185.

(b) *Notice of revocation or suspension.* The port director will revoke or suspend access to the Customs security area and demand surrender of the Customs access seal by giving notice of the revocation or suspension and demand in writing to the employee, with a copy of the notice to the employer. The notice will indicate whether the revocation or suspension is effective immediately or is proposed.

(1) *Immediate revocation or suspension.* When the revocation or suspension of access and the surrender of the Customs access seal are effective immediately, the port director will issue a final notice of revocation or suspension. The port director or his designee may deny physical access to the Customs security area and may demand surrender of an approved Customs access seal at any time on an emergency basis prior to issuance of a final notice of revocation or suspension whenever in the judgment of the port director or his designee an emergency situation involving public health, safety, or security is involved and, in such a case, a final notice of revocation or suspension will be issued to the affected employee within 10 calendar days of the emergency action. A final notice of revocation or suspension will state the specific grounds for the immediate revocation or suspension, direct the employee to immediately surrender the Customs access seal if that Customs access seal has not already been surrendered, and advise the employee that he may choose to pursue one of the following two options:

(i) Submit a new application for an approved Customs access seal, in accordance with the provisions of § 122.182(c), on or after the 180th calendar day following the date of the final notice of revocation or suspension; or

(ii) File a written administrative appeal of the final notice of revocation or suspension with the port director in accordance with paragraph (c) of this section within 30 calendar days of the date of the final notice of revocation or suspension. The appeal may request that a hearing be held in accordance with paragraph (d) of this section, and in that case the appeal also must demonstrate that there is a genuine issue of fact that is material to the revocation or suspension action.

(2) *Proposed revocation or suspension*—(i) *Issuance of notice.* When the revocation or suspension of access and the surrender of the Customs access seal is proposed, the port director will issue a notice of proposed revocation or suspension. The notice of proposed revocation or suspension will state the specific grounds for the proposed action, inform the employee that he may continue to have access to the Customs security area and may retain the Customs access seal pending issuance of a final notice under paragraph (b)(2)(ii) of this section, and advise the employee that he may file with the port director a written response addressing the grounds for the proposed action within 10 calendar days of the date the notice of proposed action was received by the employee. The employee may respond by accepting responsibility, explaining extenuating circumstances, and/or providing rebuttal evidence. The employee also may ask for a meeting with the port director or his designee to discuss the proposed action.

(ii) *Final notice*—(A) *Based on nonresponse.* If the employee does not respond to the notice of proposed action, the port director will issue a final notice of revocation or suspension within 30 calendar days of the date the notice of proposed action was received by the employee. The final notice of revocation or suspension will state the specific grounds for the revocation or suspension, direct the employee to immediately surrender the Customs access seal, and advise the employee that he may choose to pursue one of the two options specified in paragraphs (b)(1)(i) and (ii) of this section.

(B) *Based on response.* If the employee files a timely response, the port director will issue a final determination regarding the status of the employee's right of access to the Customs security area within 30 calendar days of the date the employee's response was received by the port director. If this final determination is adverse to the employee, then the final notice of revocation or suspension will state the specific grounds for the revocation or suspension, direct the employee to immediately surrender the Customs access seal, and advise the employee that he may choose to pursue one of the two options specified in paragraphs (b)(1)(i) and (ii) of this section.

(c) *Appeal procedures*—(1) *Filing of appeal.* The employee may file a written appeal of the final notice of revocation or suspension with the port director within 10 calendar days following receipt of the final notice of revocation or suspension. The appeal must be filed in duplicate and must set forth the response of the employee to the statement of the port director. The port director may, in his discretion, allow the employee additional time to submit documentation or other information in support of the appeal.

(2) *Action by port director*—(i) *If a hearing is requested.* If the appeal requests that a hearing be held, the port director will first review the appeal to determine whether there is a genuine issue of fact that is material to the revocation or suspension action. If a hearing is required because the port director finds that there is a genuine issue of fact that is

material to the revocation or suspension action, a hearing will be held, and a decision on the appeal will be rendered, in accordance with paragraphs (d) through (f) of this section. If the port director finds that there is no genuine issue of fact that is material to the revocation or suspension action, no hearing will be held and the port director will forward the administrative record as provided in paragraph (c)(2)(ii) of this section for the rendering of a decision on the appeal under paragraph (c)(3) of this section.

(ii) *CMC review.* If no hearing is requested or if the port director finds that a requested hearing is not required, following receipt of the appeal the port director will forward the administrative record to the director of field operations at the Customs Management Center having jurisdiction over the office of the port director for a decision on the appeal. The transmittal of the port director must include a response to any disputed issues raised in the appeal.

(3) *Action by the director.* Following receipt of the administrative record from the port director, the director of field operations will render a written decision on the appeal based on the record forwarded by the port director. The decision will be rendered within 30 calendar days of receipt of the record and will be transmitted to the port director and served by the port director on the employee. A decision on an appeal rendered under this paragraph will constitute the final administrative action on the matter.

(d) *Hearing.* A hearing will be conducted in connection with an appeal of a final notice of revocation or suspension of access to the Customs security area only if the affected employee in writing requests a hearing and demonstrates that there is a genuine issue of fact that is material to the revocation or suspension action. If a hearing is required, it must be held before a hearing officer designated by the Commissioner, or his designee. The employee will be notified of the time and place of the hearing at least 5 calendar days before the hearing. The employee may be represented by counsel at the revocation or suspension hearing. All evidence and testimony of witnesses in the proceeding, including substantiation of charges and the answer to the charges, must be presented. Both parties will have the right of cross-examination. A stenographic record of the proceedings will be made upon request and a copy furnished to the employee. At the conclusion of the proceedings or review of a written appeal, the hearing officer must promptly transmit all papers and the stenographic record to the director of field operations, together with the recommendation for final action. If neither the employee nor his attorney appears for a scheduled hearing, the hearing officer must record that fact, accept any appropriate testimony, and conclude the hearing. The hearing officer must promptly transmit all papers, together with his recommendations, to the director of field operations.

(e) *Additional written views.* Within 10 calendar days after delivery of a copy of the stenographic record of the hearing to the director of field operations, either party may submit to the director of field operations

additional written views and arguments on matters in the record. A copy of any submission will be provided to the other party. Within 10 calendar days of receipt of the copy of the submission, the other party may file a reply with the director of field operations, and a copy of the reply will be provided to the other party. No further submissions will be accepted.

(f) *Decision.* After consideration of the recommendation of the hearing officer and any additional written submissions and replies made under paragraph (e) of this section, the director of field operations will render a written decision. The decision will be transmitted to the port director and served by the port director on the employee. A decision on an appeal rendered under this paragraph will constitute the final administrative action on the matter.

9. In § 122.188:

a. The section heading is amended by removing the word "identification" and adding, in its place, the words "Customs access seal";

b. Paragraph (a) is amended by removing the words "identification card, strip, or seal" in two places in the first sentence and adding, in their place, the words "Customs access seal" and by removing the words "identification card" in the last sentence and adding, in their place, the words "Customs access seal";

c. Paragraph (b) is amended by removing the words "identification card, strip, or seal" wherever they appear and adding, in their place, the words "Customs access seal";

d. Paragraph (c) is amended by removing the words "identification card, strip, or seal" in the second and third sentences and adding, in their place, the words "Customs access seal" and by removing the words "identification cards, strips, or seals" in the last sentence and adding, in their place, the words "Customs access seal"; and

e. Paragraph (d) is amended by removing the words "identification card, strip, or seal" wherever they appear and adding, in their place, the words "Customs access seal".

10. New § 122.189 is added to read as follows:

§ 122.189 Bond liability.

Any failure on the part of a principal to comply with the conditions of the bond required under § 122.182(c), including a failure of an employer to comply with any requirement applicable to the employer under this subpart, will constitute a breach of the bond and may result in a claim for liquidated damages under the bond.

ROBERT C. BONNER,
Commissioner of Customs.

Approved: July 24, 2002.
TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 29, 2002 (67 FR 48977)]

(T.D. 02–42)

SYNOPSIS OF DRAWBACK RULING

The following are synopses of a drawback rulings issued August 22, 2001, to January 9, 2002, inclusive, pursuant to Subparts J, Part 191, Customs Regulations.

In the synopsis below is listed for the drawback ruling approved under 19 U.S.C. 1313(d), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the date the application was signed, the Port Director to whom the ruling was forwarded, and the date on which it was approved.

Dated: July 29, 2002.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Clarendon Flavor Engineering LLC
Articles: food flavorings
Merchandise: Domestic tax-paid ethyl alcohol (190° proof)
Application signed: January 30, 2001
Ruling forwarded to PD of Customs: New York, August 22, 2001
Ruling: 46–00017–000

(B) Company: Dr. Pepper/Seven Up Manufacturing Company
Articles: flavoring extracts
Merchandise: Domestic tax-paid alcohol (190° proof)
Application signed: December 7, 2001
Ruling forwarded to PDs of Customs: New York & San Francisco, December 19, 2001
Ruling: 44–00018–000

(C) Company: Haarmann & Reimer, a general partnership
Articles: flavoring extracts
Merchandise: Domestic tax-paid alcohol (190° proof)
Application signed: October 9, 2001
Ruling forwarded to PDs of Customs: New York & San Francisco, January 9, 2002
Ruling: 44–00019–000

(T.D. 02–43)

SYNOPSES OF DRAWBACK RULINGS

The following are synopses of drawback rulings approved February 1, 2002 to March 6, 2002, inclusive, pursuant to Subparts A & B, Part 191 of the Customs Regulations.

In the synopses below are listed for each drawback ruling approved under 19 U.S.C. 1313(a), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the date the application was signed, the Port Director to whom the ruling was forwarded or approved by, the date on which it was approved and the ruling number.

Dated: July 29, 2002,

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Aldila Golf Corp.
Articles: carbon fiber prepreg
Merchandise: continuous carbon fiber
Application signed: January 3, 2002
Ruling Forwarded to PD of Customs: Chicago, February 4, 2002
Effect on other rulings: none
Ruling: 41–01790–000

(B) Company: Aldila Materials Technology Corp.
Articles: continuous carbon fiber
Merchandise: synthetic filament tow, acrylic or modacrylic
Application signed: February 8, 2002
Ruling Forwarded to PD of Customs: Chicago, March 6, 2002
Effect on other rulings: none
Ruling: 41–01793–000

(C) Company: Carbon Fiber Technology LLC
Articles: continuous carbon fiber
Merchandise: synthetic acrylic filament tow; synthetic modacrylic filament tow
Application signed: January 25, 2002
Ruling Forwarded to PD of Customs: Chicago, February 1, 2002
Effect on other rulings: none
Ruling: 41–01782–000

(T.D. 02–44)

SYNOPSES OF DRAWBACK RULINGS

The following are synopses of drawback rulings approved March 28, 1998, to May 21, 2002, inclusive, pursuant to Subparts A & B, Part 191 of the Customs Regulations.

In the synopses below are listed for each drawback ruling approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the date the application was signed, the Port Director to whom the ruling was forwarded to or approved by, the date on which it was approved and the ruling number.

Dated: July 29, 2002,

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Anocoil Corporation
Articles: aluminum lithographic printing plates
Merchandise: coiled aluminum alloy sheets
Application signed: December 17, 2001
Ruling Forwarded to PD of Customs: New York, May 6, 2002
Effect on other rulings: none
Ruling: 44–06294–000

(B) Company: Avecia Inc.
Articles: yellow 318Y
Merchandise: pro-jet yellow 1G liquid; olfine STG; BTG (triethylene glycol monobutyl ether)
Application signed: November 29, 2001
Ruling Forwarded to PD of Customs: New York, April 18, 2002
Effect on other rulings: none
Ruling: 44–06285–000

(C) Company: Avecia Inc.
Articles: black 504 and 506 BSP inks
Merchandise: bonjet black 817–L; olfine STG; pro-jet fast black 2 CF–1 liquid; pro-jet yellow 1G liquid
Application signed: March 5, 2002
Ruling Forwarded to PD of Customs: New York, May 9, 2002
Effect on other rulings: none
Ruling: 44–06299–000

(D) Company: Aventis CropScience USA LP
Articles: insecticides; nematicides
Merchandise: ethoprop technical a/k/a o-ethyl s, s-dipropyl-phosphorodithioate
Application signed: November 15, 2001
Ruling Forwarded to PD of Customs: New York, April 12, 2002
Effect on other rulings: none
Ruling: 44–06283–000

(E) Company: Aventis CropScience USA-LP (successor to AgrEvo USA Company)
Articles: glufosinate ammonia 50%, a/k/a GA 50, a/k/a ammonium-DL-homoalanin-4-yl-(Methyl)phosphinate
Merchandise: ACM a/k/a phosphinic acid [3-acetyloxy-3-cyanopropyl] methylphosphinic acid, butylester
Application signed: July 1, 2001
Ruling Forwarded to PD of Customs: New York, April 30, 2002
Effect on other rulings: none
Ruling: 44–06287–000

(F) Company: Bestfoods
Articles Not Modified: peanut butter
Merchandise Not Modified: peanut slurry
Supplemental application signed: September 7, 1999
Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, February 2, 2001
Effect on other rulings: modifies T.D. 01–02–F (44–04697–000) to cover change in company name from CPC International Inc.
Ruling: 44–04697–001

(G) Company: BP Amoco Chemical Co.
Articles: trimellitic anhydride (TMA)
Merchandise: trimellitic acid (TMLA)
Application signed: October 3, 2001
Ruling Forwarded to PDs of Customs: Houston & San Francisco, April 8, 2002
Effect on other rulings: none
Ruling: 44–06276–000

(H) Company: Chevron Phillips Chemical Company LP
Articles: low density linear polyethylene (LDLPE); high density polyethylene (HDPE); linear low density polyethylene (LLDPE)
Merchandise: ethylene
Application signed: March 28, 2002
Ruling Forwarded to PDs of Customs: Houston & San Francisco, April 30, 2002
Effect on other rulings: successor to Chevron Chemical Company LLC., T.D. 99–66–H (44–00308–001) and Phillips Petroleum Company T.D. 97–92–R under 19 U.S.C. 1313(s)
Ruling: 44–00308–002

(I) Company: Fitel Lucent Technologies
Articles Not Modified: fiber optic cable
Merchandise Not Modified: optical fiber; polybutylene terephthalate plastic (PBT); galvanized steel wire
Supplemental application signed: July 14, 1997
Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, March 30, 1998
Effect on other rulings: modifies T.D. 96–45–D (44–04710–000) to cover change in company name from AT&T Fitel
Ruling: 44–04710–001

(J) Company: Forged Metals, Inc.
Articles: titanium products (rings; cut shapes; formed parts)
Merchandise: titanium ingot; billet; bar; bloom; plate; sheet
Application signed: February 20, 2002
Ruling Forwarded to PDs of Customs: Houston & San Francisco, May 07, 2002
Effect on other rulings: none
Ruling: 44–06298–000

(K) Company: Glen Raven, Inc.
Articles: acrylic, modacrylic and polyester yarns, dyed and undyed; acrylic and modacrylic woven fabrics, treated/untreated; coated/uncoated
Merchandise: natural and solution dyed acrylic staple fibers; solution dyed modacrylic staple fibers; natural and solution dyed polyester staple fibers
Application signed: February 4, 2002
Ruling Forwarded to PDs of Customs: New York & Miami, April 12, 2002
Effect on other rulings: none
Ruling: 44–06275–000

(L) Company: H.C. Starck (New Jersey), Inc.
Articles Not Modified: tungsten powder; tungsten carbide powder
Merchandise Not Modified: KU–1000 powder; tungsten alloy powder; tungsten alloy parts and fabrication
Supplemental application signed: January 22, 2002
Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, February 20, 2002
Effect on other rulings: modifies T.D. 01–87–W (44–06145–000) to cover change in company name from Kulite Tungsten Corporation
Ruling: 44–06145–001

(M) Company: International Light Metals
Articles: titanium alloy mill products—ingot, billet, bar, billet extrusion, pipe, tube, angles, channels and other structural forms
Merchandise: titanium sponge
Application signed: June 22, 1989
Ruling Forwarded to PD of Customs: New York, May 15, 2002
Effect on other rulings: none
Ruling: 44–06307–000

(N) Company: Isola Laminate Systems Corporation
Articles: bonding sheet; pressed laminates
Merchandise: woven glass fabric
Application signed: June 22, 2001
Ruling Forwarded to PD of Customs: Chicago, April 22, 2002
Effect on other rulings: none
Ruling: 44–06288–000

(O) Company: Kyocera Mita South Carolina Inc.
Articles: toners
Merchandise: bontron S–34; himer M–221 toner resin; iron oxide black H; spilon black; styrene acrylic copolymer S-LEC P596; titanium dioxide TAF1500S
Application signed: January 23, 2002
Ruling Forwarded to PD of Customs: Chicago, April 30, 2002
Effect on other rulings: none
Ruling: 44–06290–000

(P) Company: The Lubrizol Corp.
Articles: alkyl-phosphates esters a/k/a APE; zinc di-organo di-thio phosphates a/k/a ZDP; linear tertiary butyl polysulfides a/k/a LTBP; lubricant additives a/k/a LA
Merchandise: dioctyl polysulfide a/k/a DIPS; oleyl cetyl alcohol a/k/a OYL–7; zinc aryldithiophosphate a/k/a PHP–10
Application signed: January 9, 2002
Ruling Forwarded to PDs of Customs: Chicago & Houston, May 13, 2002
Effect on other rulings: none
Ruling: 44–06304–000

(Q) Company: Martek Biosciences Corp.
Articles: ARASCO® & FORMULAID®, both refined, bleached & deodorized
Merchandise: arachidonic acid oil
Application signed: September 24, 2001
Ruling Forwarded to PD of Customs: Chicago, April 10, 2002
Effect on other rulings: none
Ruling: 44–06279–000

(R) Company: Nan-Ya Plastics Corporation, America
Articles: mono ethylene glycol; di ethylene glycol; tri ethylene glycol
Merchandise: ethylene
Application signed: March 27, 2002
Ruling forwarded to PDs of Customs: Houston & San Francisco, May 21, 2002
Effect on other rulings: none
Ruling: 44–06312–000

(S) Company: Phillips Petroleum Company
Articles: petroleum products and petrochemicals
Merchandise: crude petroleum and petroleum derivatives
Application Signed: August 9, 2001
Ruling forwarded to PD of Customs: Houston, May 16, 2002
Effect on other rulings: terminates T.D. 98–27–1 (44–04064–001)
Ruling: 44–04064–002

(T) Company: RTI Fabrication LP
Articles: titanium mill products of cut shapes and formed parts
Merchandise: titanium ingot; billet; bar; bloom; plate; sheet
Application signed: March 13, 2002
Ruling Forwarded to PDs of Customs: Houston & San Francisco, May 10, 2002
Effect on other rulings: none
Ruling: 44–06303–000

(U) Company: Schlosser Forge Company
Articles: titanium products (rings; cut shapes; formed parts)
Merchandise: titanium ingot; billet; bar; bloom; plate; sheet
Application signed: February 14, 2002
Ruling forwarded to PDs of Customs: Houston & San Francisco, May 9, 2002
Effect on other rulings: none
Ruling: 44–06300–000

(V) Company: TDY Industries, Inc., (Wah Chang Division)
Articles: titanium and titanium alloy forgings and mill products, such as ingot, billet, plate, extrusions, sheet, strip, foil, bar, tubing, wire, castings and powder
Merchandise: titanium sponge; alloyed and unalloyed titanium ingot; titanium scrap
Application signed: February 13, 2002
Ruling forwarded to PD of Customs: New York, May 3, 2002
Effect on other rulings: none
Ruling: 44–06292–000

(W) Company: Toray Composites (America), Inc.
Articles: carbon fiber tape pre-impregnated with epoxy resin
Merchandise: carbon fiber
Application signed: February 19, 2002
Ruling forwarded to PDs of Customs: San Francisco & Houston, April 30, 2002
Effect on other rulings: none
Ruling: 44–06291–000

(X) Company: Valent USA Corporation
Articles: Halmark®, a finished pesticide a/k/a Sumi-alpha®, Sumialpha®, Sumigold®, Sumicidin®-Super, Hallmark® or Sumidan® Technical
Merchandise: Esfenvalerate® Technical; (S)-alpha-cyano-3-phenoxbenzyl (S)-2(4-chlorophenyl)-3-methylbutyrate
Application signed: March 8, 2002
Ruling forwarded to PD of Customs: Boston, April 29, 2002
Effect on other rulings: none
Ruling: 44–06289–000

(Y) Company: Vishay Sprague, Inc.
Articles Not Modified: finished capacitors and semi-finished capacitors in pellet form
Merchandise: tantalum wire; tantalum powder
Supplemental application signed: September 19, 2001
Ruling Forwarded to PD of Customs: New York, April 4, 2002
Effect on other rulings: modifies T.D. 99–28–V (44–05462–000)
Ruling: 44–05462–001

(Z) Company: Western Digital Corporation
Articles: disk media
Merchandise: aluminum substrates
Application signed: January 9, 2002
Ruling Forwarded to PD of Customs: San Francisco, April 30, 2002
Effect on other rulings: terminates T.D. 96–71–Z (44–04733–000)
Ruling: 44–04733–001

(T.D. 02–45)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR JULY 2002

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 02–41 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): July 4, 2002.

Brazil real:	
August 26, 2002	$0.331126
August 27, 2002	.331126
August 28, 2002	.331126
August 29, 2002	.318827
August 30, 2002	.306279
August 31, 2002	.286944
China yuan:	
August 31, 2002	$0.107797
Venezuela bolivar:	
August 2, 2002	$0.000759
August 3, 2002	.000769
August 4, 2002	.000769
August 5, 2002	.000778
August 6, 2002	.000778
August 7, 2002	.000778
August 10, 2002	.000793
August 11, 2002	.000775
August 12, 2002	.000778
August 13, 2002	.000778
August 14, 2002	.000778
August 15, 2002	.000754
August 16, 2002	.000757
August 17, 2002	.000763
August 18, 2002	.000760
August 19, 2002	.000790
August 20, 2002	.000790
August 21, 2002	.000790
August 22, 2002	.000766
August 23, 2002	.000759
August 24, 2002	.000758
August 25, 2002	.000758
August 26, 2002	.000758
August 27, 2002	.000758
August 28, 2002	.000758
August 29, 2002	.000752

Dated: August 1, 2002.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 02–46)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JULY 2002

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): July 4, 2002.

Austria schilling:	
August 1, 2002	$0.071895
August 2, 2002	.071510
August 3, 2002	.071336
August 4, 2002	.071336
August 5, 2002	.070711
August 6, 2002	.070711
August 7, 2002	.070711
August 8, 2002	.071721
August 9, 2002	.072222
August 10, 2002	.071873
August 11, 2002	.072142
August 12, 2002	.071975
August 13, 2002	.071975
August 14, 2002	.071975
August 15, 2002	.073196
August 16, 2002	.073305
August 17, 2002	.073240
August 18, 2002	.073160
August 19, 2002	.073807
August 20, 2002	.073807
August 21, 2002	.073807
August 22, 2002	.073385
August 23, 2002	.072186
August 24, 2002	.072273
August 25, 2002	.072651
August 26, 2002	.071815
August 27, 2002	.071815
August 28, 2002	.071815
August 29, 2002	.071067
August 30, 2002	.071793
August 31, 2002	.071190
Belgium franc:	
August 1, 2002	$0.024524
August 2, 2002	.024393
August 3, 2002	.024333
August 4, 2002	.024333
August 5, 2002	.024120
August 6, 2002	.024120
August 7, 2002	.024120
August 8, 2002	.024465
August 9, 2002	.024636

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 2002 (continued):

Belgium franc (continued):

August 10, 2002	$0.024517
August 11, 2002	.024608
August 12, 2002	.024551
August 13, 2002	.024551
August 14, 2002	.024551
August 15, 2002	.024968
August 16, 2002	.025005
August 17, 2002	.024983
August 18, 2002	.024955
August 19, 2002	.025176
August 20, 2002	.025176
August 21, 2002	.025176
August 22, 2002	.025032
August 23, 2002	.024623
August 24, 2002	.024653
August 25, 2002	.024782
August 26, 2002	.024497
August 27, 2002	.024497
August 28, 2002	.024497
August 29, 2002	.024242
August 30, 2002	.024489
August 31, 2002	.024284

Finland markka:

August 1, 2002	$0.166388
August 2, 2002	.165497
August 3, 2002	.165093
August 4, 2002	.165093
August 5, 2002	.163647
August 6, 2002	.163647
August 7, 2002	.163647
August 8, 2002	.165985
August 9, 2002	.167145
August 10, 2002	.166338
August 11, 2002	.166960
August 12, 2002	.166573
August 13, 2002	.166573
August 14, 2002	.166573
August 15, 2002	.169399
August 16, 2002	.169651
August 17, 2002	.169500
August 18, 2002	.169315
August 19, 2002	.170812
August 20, 2002	.170812
August 21, 2002	.170812
August 22, 2002	.169836
August 23, 2002	.167061
August 24, 2002	.167263
August 25, 2002	.168137
August 26, 2002	.166203
August 27, 2002	.166203
August 28, 2002	.166203
August 29, 2002	.164471
August 30, 2002	.166153
August 31, 2002	.164757

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 2002 (continued):

France franc:

August 1, 2002	$0.150818
August 2, 2002	.150010
August 3, 2002	.149644
August 4, 2002	.149644
August 5, 2002	.148333
August 6, 2002	.148333
August 7, 2002	.148333
August 8, 2002	.150452
August 9, 2002	.151504
August 10, 2002	.150772
August 11, 2002	.151336
August 12, 2002	.150986
August 13, 2002	.150986
August 14, 2002	.150986
August 15, 2002	.153547
August 16, 2002	.153775
August 17, 2002	.153638
August 18, 2002	.153470
August 19, 2002	.154827
August 20, 2002	.154827
August 21, 2002	.154827
August 22, 2002	.153943
August 23, 2002	.151428
August 24, 2002	.151611
August 25, 2002	.152403
August 26, 2002	.150650
August 27, 2002	.150650
August 28, 2002	.150650
August 29, 2002	.149080
August 30, 2002	.150604
August 31, 2002	.149339

Germany Deutsche mark:

August 1, 2002	$0.505821
August 2, 2002	.503111
August 3, 2002	.501884
August 4, 2002	.501884
August 5, 2002	.497487
August 6, 2002	.497487
August 7, 2002	.497487
August 8, 2002	.504594
August 9, 2002	.508122
August 10, 2002	.505668
August 11, 2002	.507559
August 12, 2002	.506383
August 13, 2002	.506383
August 14, 2002	.506383
August 15, 2002	.514973
August 16, 2002	.515740
August 17, 2002	.515280
August 18, 2002	.514718
August 19, 2002	.519268
August 20, 2002	.519268
August 21, 2002	.519268
August 22, 2002	.516303
August 23, 2002	.507866

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 2002 (continued):

Germany Deutsche mark:	
August 24, 2002	$0.508480
August 25, 2002	.511138
August 26, 2002	.505259
August 27, 2002	.505259
August 28, 2002	.505259
August 29, 2002	.499992
August 30, 2002	.505105
August 31, 2002	.500862
Greece drachma:	
August 1, 2002	$0.002903
August 2, 2002	.002888
August 3, 2002	.002881
August 4, 2002	.002881
August 5, 2002	.002855
August 6, 2002	.002855
August 7, 2002	.002855
August 8, 2002	.002896
August 9, 2002	.002917
August 10, 2002	.002902
August 11, 2002	.002913
August 12, 2002	.002907
August 13, 2002	.002907
August 14, 2002	.002907
August 15, 2002	.002956
August 16, 2002	.002960
August 17, 2002	.002958
August 18, 2002	.002954
August 19, 2002	.002980
August 20, 2002	.002980
August 21, 2002	.002980
August 22, 2002	.002963
August 23, 2002	.002915
August 24, 2002	.002919
August 25, 2002	.002934
August 26, 2002	.002900
August 27, 2002	.002900
August 28, 2002	.002900
August 29, 2002	.002870
August 30, 2002	.002899
August 31, 2002	.002875
Ireland pound:	
August 1, 2002	$1.256152
August 2, 2002	1.249422
August 3, 2002	1.246375
August 4, 2002	1.246375
August 5, 2002	1.235455
August 6, 2002	1.235455
August 7, 2002	1.235455
August 8, 2002	1.253105
August 9, 2002	1.261866
August 10, 2002	1.255771
August 11, 2002	1.260469
August 12, 2002	1.257549
August 13, 2002	1.257549

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 2002 (continued):

Ireland pound (continued):	
August 14, 2002	$1.257549
August 15, 2002	1.278880
August 16, 2002	1.280785
August 17, 2002	1.279642
August 18, 2002	1.278245
August 19, 2002	1.289546
August 20, 2002	1.289546
August 21, 2002	1.289546
August 22, 2002	1.282182
August 23, 2002	1.261231
August 24, 2002	1.262755
August 25, 2002	1.269357
August 26, 2002	1.254755
August 27, 2002	1.254755
August 28, 2002	1.254755
August 29, 2002	1.241677
August 30, 2002	1.254374
August 31, 2002	1.243835
Italy lira:	
August 1, 2002	$0.000511
August 2, 2002	.000508
August 3, 2002	.000507
August 4, 2002	.000507
August 5, 2002	.000503
August 6, 2002	.000503
August 7, 2002	.000503
August 8, 2002	.000510
August 9, 2002	.000513
August 10, 2002	.000511
August 11, 2002	.000513
August 12, 2002	.000511
August 13, 2002	.000511
August 14, 2002	.000511
August 15, 2002	.000520
August 16, 2002	.000521
August 17, 2002	.000520
August 18, 2002	.000520
August 19, 2002	.000525
August 20, 2002	.000525
August 21, 2002	.000525
August 22, 2002	.000522
August 23, 2002	.000513
August 24, 2002	.000514
August 25, 2002	.000516
August 26, 2002	.000510
August 27, 2002	.000510
August 28, 2002	.000510
August 29, 2002	.000505
August 30, 2002	.000510
August 31, 2002	.000506
Luxembourg franc:	
August 1, 2002	$0.024524
August 2, 2002	.024393
August 3, 2002	.024333

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 2002 (continued):

Luxembourg franc (continued):

August 4, 2002	$0.024333
August 5, 2002	.024120
August 6, 2002	.024120
August 7, 2002	.024120
August 8, 2002	.024465
August 9, 2002	.024636
August 10, 2002	.024517
August 11, 2002	.024608
August 12, 2002	.024551
August 13, 2002	.024551
August 14, 2002	.024551
August 15, 2002	.024968
August 16, 2002	.025005
August 17, 2002	.024983
August 18, 2002	.024955
August 19, 2002	.025176
August 20, 2002	.025176
August 21, 2002	.025176
August 22, 2002	.025032
August 23, 2002	.024623
August 24, 2002	.024653
August 25, 2002	.024782
August 26, 2002	.024497
August 27, 2002	.024497
August 28, 2002	.024497
August 29, 2002	.024242
August 30, 2002	.024489
August 31, 2002	.024284

Netherlands guilder:

August 1, 2002	$0.448925
August 2, 2002	.446520
August 3, 2002	.445431
August 4, 2002	.445431
August 5, 2002	.441528
August 6, 2002	.441528
August 7, 2002	.441528
August 8, 2002	.447836
August 9, 2002	.450967
August 10, 2002	.448789
August 11, 2002	.450468
August 12, 2002	.449424
August 13, 2002	.449424
August 14, 2002	.449424
August 15, 2002	.457047
August 16, 2002	.457728
August 17, 2002	.457320
August 18, 2002	.456821
August 19, 2002	.460859
August 20, 2002	.460859
August 21, 2002	.460859
August 22, 2002	.458227
August 23, 2002	.450740
August 24, 2002	.451284
August 25, 2002	.453644
August 26, 2002	.448426

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 2002 (continued):

Netherlands guilder (continued):	
August 27, 2002	$0.448426
August 28, 2002	.448426
August 29, 2002	.443752
August 30, 2002	.448289
August 31, 2002	.444523
Portugal escudo:	
August 1, 2002	$0.004935
August 2, 2002	.004908
August 3, 2002	.004896
August 4, 2002	.004896
August 5, 2002	.004853
August 6, 2002	.004853
August 7, 2002	.004853
August 8, 2002	.004923
August 9, 2002	.004957
August 10, 2002	.004933
August 11, 2002	.004952
August 12, 2002	.004940
August 13, 2002	.004940
August 14, 2002	.004940
August 15, 2002	.005024
August 16, 2002	.005031
August 17, 2002	.005027
August 18, 2002	.005021
August 19, 2002	.005066
August 20, 2002	.005066
August 21, 2002	.005066
August 22, 2002	.005037
August 23, 2002	.004955
August 24, 2002	.004961
August 25, 2002	.004986
August 26, 2002	.004929
August 27, 2002	.004929
August 28, 2002	.004929
August 29, 2002	.004878
August 30, 2002	.004928
August 31, 2002	.004886
South Korea won:	
August 1, 2002	$0.000832
August 2, 2002	.000833
August 3, 2002	.000831
August 4, 2002	.000831
August 5, 2002	.000833
August 6, 2002	.000833
August 7, 2002	.000833
August 8, 2002	.000837
August 9, 2002	.000849
August 10, 2002	.000851
August 11, 2002	.000851
August 12, 2002	.000850
August 13, 2002	.000850
August 14, 2002	.000850
August 15, 2002	.000854
August 16, 2002	.000857

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 2002 (continued):

South Korea won (continued):

August 17, 2002	$0.000857
August 18, 2002	.000855
August 19, 2002	.000858
August 20, 2002	.000858
August 21, 2002	.000858
August 22, 2002	.000862
August 23, 2002	.000856
August 24, 2002	.000855
August 25, 2002	.000858
August 26, 2002	.000844
August 27, 2002	.000844
August 28, 2002	.000844
August 29, 2002	.000837
August 30, 2002	.000842
August 31, 2002	.000845

Spain peseta:

August 1, 2002	$0.005946
August 2, 2002	.005914
August 3, 2002	.005900
August 4, 2002	.005900
August 5, 2002	.005848
August 6, 2002	.005848
August 7, 2002	.005848
August 8, 2002	.005931
August 9, 2002	.005973
August 10, 2002	.005944
August 11, 2002	.005966
August 12, 2002	.005952
August 13, 2002	.005952
August 14, 2002	.005952
August 15, 2002	.006053
August 16, 2002	.006062
August 17, 2002	.006057
August 18, 2002	.006050
August 19, 2002	.006104
August 20, 2002	.006104
August 21, 2002	.006104
August 22, 2002	.006069
August 23, 2002	.005970
August 24, 2002	.005977
August 25, 2002	.006008
August 26, 2002	.005939
August 27, 2002	.005939
August 28, 2002	.005939
August 29, 2002	.005877
August 30, 2002	.005937
August 31, 2002	.005888

Taiwan N.T. dollar:

August 1, 2002	$0.029878
August 2, 2002	.029860
August 3, 2002	.029851
August 4, 2002	.029851
August 5, 2002	.029869
August 6, 2002	.029869

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for July 2002 (continued):

Taiwan N.T. dollar (continued):

August 7, 2002	$0.029869
August 8, 2002	.029931
August 9, 2002	.030048
August 10, 2002	.030139
August 11, 2002	.030139
August 12, 2002	.030139
August 13, 2002	.030139
August 14, 2002	.030139
August 15, 2002	.030202
August 16, 2002	.030303
August 17, 2002	.030441
August 18, 2002	.030404
August 19, 2002	.030423
August 20, 2002	.030423
August 21, 2002	.030423
August 22, 2002	.030414
August 23, 2002	.030175
August 24, 2002	.030075
August 25, 2002	.030066
August 26, 2002	.029815
August 27, 2002	.029815
August 28, 2002	.029815
August 29, 2002	.029621
August 30, 2002	.029709
August 31, 2002	.029753

Dated: August 1, 2002.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 6–2002)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of June 2002. The last notice was published in the CUSTOMS BULLETIN on June 26, 2002.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief, Intellectual Property Rights Branch, (202) 927–2330.

Dated: July 25, 2002.

JOANNE ROMAN STUMP,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0200114	20020613	20210613	SMILING FACE WITH DRAGONFLY	CRESCO INC.	N
COP0200115	20020613	20210613	FROG KING	CRESCO INC.	N
COP0200116	20020613	20210613	LAUGHING FACE WITH BIRD	CRESCO INC.	N
COP0200117	20020613	20210613	BIG NOSE WITH DRAGONFLY	CRESCO INC.	N
COP0200118	20020618	20210618	POKEMON PUZZLE LEAGUE	NINTENDO OF AMERICA INC.	N
COP0200119	20020619	20220619	THE JAZZMAN 3346M	MASTER TOYS & NOVELTIES, INC.	N
COP0200120	20020619	20220619	SINGING PATRIOTIC G.I. ITEM #FOD-001B	MASTER TOYS & NOVELTIES, INC.	N
COP0200121	20020619	20220619	NUTCRACKER	BATH & BODY WORKS, INC.	N
COP0200122	20020627	20220627	GRAPELEAF PATTERN PLANTER/POT	CONSOLIDATED FOAM, INC.	N
COP0200123	20020627	20220627	SAFETY TIPS IMPORTANT INFORMATION FROM N.K.H.A.	NATIONAL KEROSENE HEATER ASS.	N
COP0200124	20020627	20220627	ASSORTED FINIALS I	MSG MARKETING, INC.	N
SUBTOTAL RECORDATION TYPE			11		
TMK0200357	20020603	20111231	TURBO	QUANTUM INSTRUMENTS, INC.	N
TMK0200358	20020612	20070401	D.P.S.	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200359	20020612	20030706	MAGGIE MCNAUGHTON	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200360	20020612	20040503	NORTON MCNAUGHTON	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200361	20020612	20070422	NORTON STUDIO	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200362	20020612	20050423	ALYSSA BROOKE (STYLIZED)	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200363	20020612	20041108	ERIKA	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200364	20020612	20090302	ERIKA & CO.	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200365	20020613	20090316	ERIKA BLUES	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200366	20020613	20090302	ERIKA COLLECTION	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200367	20020613	20090302	ERIKA II & CO.	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200368	20020613	20090316	ERIKA II STUDIO	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200369	20020613	20090316	ERIKA STUDIO	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200370	20020613	20021215	PRIVATE PARTY	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200371	20020613	20100508	PRIVATE PARTY	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200372	20020613	20021020	RICKI	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200373	20020613	20100614	CLAMATO	MOTT'S INC.	N
TMK0200374	20020613	20031102	SUGAR BLUES	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200375	20020613	20070929	SUGAR CO. LTD.	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200377	20020613	20051206	ENERGIE (STYLIZED)	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200378	20020613	20080113	JAMIE SCOTT	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200379	20020613	20020909	SUGAR BLUES	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200380	20020614	20070728	ROLLERCOASTER	ANATEX ENTERPRISES INC.	N
TMK0200381	20020614	20050502	MONDO UOMO	SILKNOTS, THE TIE COMPANY INC.	N
TMK0200382	20020618	20110227	SPC AND DESIGN	ANDREW, JOSHUA AND ASSOCIATES N	N
TMK0200383	20020618	20110220	SANG-A AND DESIGN	ANDREW, JOSHUA AND ASSOCIATES N	N
TMK0200384	20020618	20110611	AS AND DESIGN	APPROPRIATE SOLUTIONS, INC.	N
TMK0200385	20020618	20030629	COSAMIN	NUTRAMAX LABORATORIES INC.	N
TMK0200386	20020618	20110515	PPS AND DESIGN	PRECISION PRODUCT SYSTEMS LLC.	N
TMK0200387	20020618	20110904	EXPRESS	EXPRESSCO INC.	N
TMK0200388	20020618	20110515	PRECISION PRODUCT SYSTEMS	PRECISION PRODUCT SYSTEMS LLC.	N
TMK0200389	20020618	20110519	HEAVEN AND DESIGN	OVERSEAS FACTORS CORPORATION	N
TMK0200390	20020618	20110721	PERMA-LASH	AMERICAN INTERNATIONAL INDUSTRIE	N
TMK0200391	20020618	20050509	LEVITON AND DESIGN	LEVITON MANUFACTURING CO., INC.	N
TMK0200392	20020618	20100801	PICNIC BOAT	TALARIA COMPANY LLC. THE	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0200393	20020618	20100710	SYSTIMAX	AVAYA INC.	N
TMK0200394	20020618	20110514	SYSTIMAX	AVAYA INC.	N
TMK0200395	20020618	20071223	ZIG-ZAG GOLD STANDARD	NORTH ATLANTIC OPERATING CO INC	Y
TMK0200396	20020618	20030608	ZIG-ZAG (AND DESIGN)	NORTH ATLANTIC OPERATING CO INC	Y
TMK0200397	20020618	20100415	ZIG ZAG	NORTH ATLANTIC OPERATING CO INC	Y
TMK0200398	20020618	20080112	ZIG ZAG	NORTH ATLANTIC OPERATING CO INC	Y
TMK0200399	20020618	20120302	ANDRE RIVALLE	E. GLUCK CORPORATION	N
TMK0200400	20020618	20081115	ZIG-ZAG (AND DESIGN)	NORTH ATLANTIC OPERATING CO INC	Y
TMK0200401	20020618	20081013	CAUTION!	VITELLO, JIM	N
TMK0200402	20020618	20070715	FLYING HORSE DESIGN	MOBILE OIL CORPORATION	N
TMK0200403	20020618	20110612	RIRI	RIRI SA	N
TMK0200404	20020618	20110206	OH' MY	NIPPON FLOUR MILLS	N
TMK0200405	20020619	20120122	DIGIRAD AND DESIGN	DIGIRAD CORPORATION	N
TMK0200406	20020619	20111020	DESIGN OF PEDESTRIAN	PEDESTRIAN CORPORATION	N
TMK0200407	20020619	20110217	PEDESTRIAN SHOPS & DESIGN	PEDESTRIAN CORPORATION	N
TMK0200408	20020619	20081024	PEDESTRIAN & DESIGN	PEDESTRIAN CORPORATION	N
TMK0200409	20020619	20080912	PEDESTRIAN & DESIGN	PEDESTRIAN CORPORATION	N
TMK0200410	20020619	20070118	CURRANTS AND DESIGN	MCNAUGHTON APPAREL HOLDINGS, INC	Y
TMK0200411	20020619	20022928	TC (STYLIZED)	MINNESOTA TWINS	N
TMK0200412	20020619	20060113	DODGERS AND DESIGN	LOS ANGELES DODGERS, INC.	N
TMK0200413	20020619	20101016	MAJOR LEAGUE BASEBALL AND DESIGN	MAJOR LEAGUE BASEBALL PROPERTIES	N
TMK0200414	20020619	20110205	PIRATES	PITTSBURGH ASSOCIATES	N
TMK0200415	20020619	20110604	CARDINALS	ST. LOUIS CARDINALS, L.P.	N
TMK0200416	20020619	20100724	BREWERS	MILWAUKEE BREWERS BASEBALL CLUB	N
TMK0200417	20020619	20101223	REDS	THE CINCINNATI REDS, LLC	N
TMK0200418	20020619	20110914	DUNHILL & DESIGN	DUNHILL TOBACCO OF LONDON LTD.	N
TMK0200419	20020619	20050307	DESIGN (BLOCK)	THE LINCOLN ELECTRIC COMPANY	N
TMK0200420	20020621	20100404	NARCISO RODRIGUEZ	NARCISO RODRIGUEZ CORPORATION	N
TMK0200421	20020621	20100418	NARCISO RODRIGUEZ	NARCISO RODRIGUEZ CORPORATION	N
TMK0200422	20020621	20030427	VILLA ROSA	AMERICAN B.D. COMPANY	N
TMK0200423	20020625	20111027	SAVIN	SAVIN CORPORATION	N
TMK0200424	20020625	20110123	MR. COFFEE (STYLIZED LETTERING)	SUNBEAM PRODUCTS INC.	N
TMK0200425	20020625	20100613	MO MOCHI (PLUS DESIGN)	USW, INC.	N
TMK0200426	20020627	20101010	FUJIYAMA	SUCCES DE PARIS	N
TMK0200427	20020627	20111229	LOPID	WARNER-LAMBERT COMPANY	N
TMK0200428	20020627	20110320	LESPORTSAC AND DESIGN	LE SPORTSAC, INC.	N
TMK0200429	20020627	20111218	CELLTEI	STYLE LIVING CORPORATION	N
TMK0200430	20020627	20120307	CHANEL	CHANEL, INC.	N
TMK0200431	20020627	20100110	BULOVA	BULOVA CORPORATION	N
TMK0200432	20020627	20101227	ACCUTRON	BULOVA CORPORATION	N
TMK0200433	20020627	20100109	GAP	GAP (APPAREL), INC.	N
TMK0200434	20020628	20110602	SOCOLOR	L'OREAL USA CREATIVE, INC.	N
TMK0200435	20020628	20111009	BIOLAGE	L'OREAL USA CREATIVE, INC.	N
TMK0200436	20020628	20090223	MATRIX	L'OREAL USA CREATIVE, INC.	N
TMK0200437	20020628	20030720	VAVOOM!	L'OREAL USA CREATIVE, INC.	N
TMK0200438	20020628	20060527	LOGICS	MATRIX ESSENTIALS, INC.	N
TMK0200439	20020628	20091012	AMPLIFY	L'OREAL USA CREATIVE, INC.	N

SUBTOTAL RECORDATION TYPE 82

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of Customs duties. For the calendar quarter beginning July 1, 2002, the interest rates for overpayments will be 5 percent for corporations and 6 percent for non-corporations, and the interest rate for underpayments will be 6 percent. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: July 1, 2002.

FOR FURTHER INFORMATION CONTACT: Ronald Wyman, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298–1200, extension 1349.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105–206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2002–33 (*see*, 2002–25 IRB ____, dated June 25, 2002), the IRS determined the rates of interest for the calendar quarter beginning July 1, 2002, and ending September 30, 2002. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (3%) plus three percentage points (3%) for a total of six percent (6%). For corporate overpayments, the rate is the Federal short-term rate (3%) plus two percentage points (2%) for a total of five percent (5%). For overpayments made by non-corporations, the rate is the Federal short-term rate (3%) plus three percentage points (3%) for a total of six percent (6%). These interest rates are subject to change for

the calendar quarter beginning October 1, 2002, and ending December 31, 2002.

For the convenience of the importing public and Customs personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of Customs duties, is published in summary format.

Beginning Date	*Ending Date*	*Underpayments (percent)*	*Overpayments (percent)*	*Corporate Overpayments (Eff. 1–1–99) (percent)*
Prior to 070174	063075	6 %	6 %	
070175	013176	9 %	9 %	
020176	013178	7 %	7 %	
020178	013180	6 %	6 %	
020180	013182	12 %	12 %	
020182	123182	20 %	20 %	
010183	063083	16 %	16 %	
070183	123184	11 %	11 %	
010185	063085	13 %	13 %	
070185	123185	11 %	11 %	
010186	063086	10 %	10 %	
070186	123186	9 %	9 %	
010187	093087	9 %	8 %	
100187	123187	10 %	9 %	
010188	033188	11 %	10 %	
040188	093088	10 %	9 %	
100188	033189	11 %	10 %	
040189	093089	12 %	11 %	
100189	033191	11 %	10 %	
040191	123191	10 %	9 %	
010192	033192	9 %	8 %	
040192	093092	8 %	7 %	
100192	063094	7 %	6 %	
070194	093094	8 %	7 %	
100194	033195	9 %	8 %	
040195	063095	10 %	9 %	
070195	033196	9 %	8 %	
040196	063096	8 %	7 %	
070196	033198	9 %	8 %	
040198	123198	8 %	7 %	
010199	033199	7 %	7 %	6 %
040199	033100	8 %	8 %	7 %
040100	033101	9 %	9 %	8 %
040101	063001	8 %	8 %	7 %
070101	123101	7 %	7 %	6 %
010102	093002	6 %	6 %	5 %

Dated: July 23, 2002.

ROBERT C. BONNER,
Commissioner of Customs.

[Published in the Federal Register, July 26, 2002 (67 FR 48968)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 31, 2002.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
(for Michael T. Schmitz, Assistant Commissioner,
Office of Regulations and Rulings.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF A CHECKBOOK ORGANIZER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a ruling letter and revocation of treatment relating to tariff classification of a checkbook organizer.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a checkbook organizer and revoking any treatment previously accorded by Customs to substantially identical merchandise. Notice of the proposed revocation was published in the CUSTOMS BULLETIN of June 26, 2002, Vol. 36, No. 26. No comments were received in response to the notice of proposed action.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 14, 2002.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Textiles Branch (202) 572–8811.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and

related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that, in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to revoke New York Ruling Letter (NY) E82903, dated June 16, 1999, was published on June 26, 2002, in the CUSTOMS BULLETIN, Vol. 36, No. 26. No comments were received in response to the notice of proposed action.

As was stated in the notice of proposed revocation, the notice covered any rulings relating to the specific issues of tariff classification set forth in the ruling, which may have existed but which had not been specifically identified. Any party who had received an interpretive ruling or decision (i.e., a ruling letter, an internal advice memorandum or decision, or a protest review decision) on the issues subject to the notice, should have advised Customs during the comment period.

In NY E82903, a multi-component article identified as a "Checkbook Organizer" was classified as a set in subheading 4202.32.2000, HTSUSA, which provides, in part, for "* * * wallets * * *: Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Other." The components were imported together, packed for retail sale, and found to comprise a "set" pursuant to General Rule of Interpretation (GRI) 3(b), with the PVC "wallet" imparting the set's essential character. It is Customs position that the "wallet" component does not have the character of, and is not similar to, wallets or other containers enumerated in heading 4202, HTSUSA, which have in common the essential characteristics and purposes of organizing, storing, protecting and carrying various items. The outer component, instead, is similar to a cover for a checkbook and is classifiable under heading 3926, HTSUSA, which covers other articles of plastics. The essential character of the set is imparted by the checkbook register component, and the "Checkbook Organizer" is classified in subheading 4820.10.4000, HTSUSA, which provides, in part, for "* * * Registers, account books * * * order books, receipt books * * * and similar articles: Other."

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(1)), Customs is revoking NY E82903 and any other rul-

ings not specifically identified which involve identical or substantially identical merchandise, to reflect the proper classification of the articles according to the analyses in Proposed Headquarters Ruling Letter (HQ) 963397, which is set forth as an Attachment to this document. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), Customs is revoking any treatment that Customs may have previously accorded to substantially identical transactions that is contrary to the position set forth in this notice.

In accordance with 19 U.S.C. § 1625(c), these rulings will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: July 26, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 26, 2002.

CLA–2 RR:CR:TE 963397 GGD
Category: Classification
Tariff No. 4820.10.4000

ERIK D. SMITHWEISS, ESQUIRE
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN LLP
245 Park Avenue, 33rd Floor
New York, NY 10167–3397

Re: Revocation of NY E82903; "Checkbook Organizer;" GRI 3(b) Set including Checkbook Register, Telephone/Address Book, Notebook, Card/Photo Holders, Pen, and Trifold Cover for Checkbook; Not Wallet of Heading 4202.

DEAR MR. SMITHWEISS:

This is in response to your request dated July 29, 1999, on behalf of your client, Archer Worldwide, Inc., for reconsideration of New York Ruling Letter (NY) E82903, issued June 16, 1999, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of a multi-component article manufactured in China. A sample has been submitted for our examination. We have reviewed NY E82903 and have found the ruling to be in error. Therefore, this ruling revokes NY E82903. We regret the delay in responding.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY E82903 was published on June 26, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 26.

Facts:

In NY E82903, the multi-component article identified as a "Checkbook Organizer" was classified as a set in subheading 4202.32.2000, HTSUSA, which provides, in part, for "* * * wallets * * *: Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Other." The sample article's outermost component, whether deemed to be a wallet

or a cover for a checkbook, is of a trifold design with a hook and loop front closure. The component is made with an outer material of unbacked polyvinyl chloride (PVC) plastic sheeting, and inner layers consisting of a paperboard stiffener and padding of foam plastic. In the closed position, the checkbook organizer measures approximately 6¼ inches in width by 4 inches in height by ½ of an inch in depth. When opened, the article's width remains the same, but it measures approximately 9½ inches in height. The interior of the article is fitted with two flat, translucent plastic sleeves, each of which extends full-width and measures approximately 3¼ inches in height.

The lower of the two sleeves is designed for the insertion of a staple-bound, 16 page checkbook register with 3 year calendar (included), or a checkbook (which is not included). The checkbook register measures approximately 6 inches in width by 3 inches in height. Loosely overlying both the lower sleeve and the checkbook register, and permanently attached by their top edges to the lower of the article's two spines, are two cardholder sleeves. Each cardholder sleeve contains a paper insert, one of which reads "Medical Card" and the other of which reads "Identification." The reverse sides of the inserts contain lines that are labeled for the entry of personal information.

The upper of the two flat, plastic sleeves lies on the interior, middle portion of the trifold component and contains a paper insert which reads "Receipts & Coupon Pocket." Overlying this paper insert, and slipped side by side into the flat plastic sleeve, are the back covers of two staple-bound, 16 page inserts, each of which measures approximately 3 inches square. One of the inserts is a telephone/address book and the other is a pad or notebook of blank paper. Above the upper sleeve, in the crease of the upper spine, is a tubular shaped pen holder of plastic sheeting, into which is inserted a retractable ball point pen. The uppermost or "fold-over" portion of the trifold article (above the pen and pen holder) extends full-width (6¼ inches), measures approximately 1¼ inch in height, and features only the "loop" segment of the article's hook and loop closure which, in the closed position, contacts the "hook" segment on the outer surface of the bottom portion.

It was determined in NY E82903 that, if imported separately, the components of the "Checkbook Organizer" would be individually classified in various subheadings, i.e., the address book in subheading 4820.10.2010, HTSUSA, the blank notebook in subheading 4820.10.2020, HTSUSA, the register in subheading 4820.10.4000, HTSUSA, the pen in subheading 9608.10.0000, and the wallet in subheading 4202.32.2000, HTSUSA. The components were imported together, however, packed for retail sale. The complete article was found to comprise a "set" pursuant to General Rule of Interpretation (GRI) 3(b), with the PVC "wallet" imparting the set's essential character.

Issue:

Whether the "Checkbook Organizer" is properly classified in subheading 4202.32.2000, HTSUSA, which covers, in part, "* * * wallets * * * and similar containers. * * *;" in subheading 3926.90.9880, HTSUSA, a basket provision which covers other articles of plastics; or under one of the provisions of heading 4820, HTSUSA, which covers, in part, "Registers * * * notebooks * * *diaries and similar articles * * * book covers (including cover boards and book jackets) of paper or paperboard."

Law and Analysis:

Classification under the HTSUSA is made in accordance with the GRI. GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Among other merchandise, chapter 48, HTSUSA, covers articles of paper or of paperboard. Note 1(h) to chapter 48, HTSUSA, states that "[t]his chapter does not cover: Articles of heading 4202 (for example, travel goods)." As noted above, some of the items covered by heading 4820 are registers, notebooks, diaries and similar articles, book covers and other articles of stationery, of paper or paperboard. The EN to heading 4820 indicate that the heading covers various articles of stationery including (in addition to the examples named in the text of the heading) notebooks of all kinds, address books, and books, pads, etc., for entering telephone numbers. It is clear that several of the checkbook organizer's components are articles of stationery that are classifiable under heading 4820,

HTSUSA. To examine the characteristics of the component in which all of the other components are fitted, we next look to heading 4202, HTSUSA.

Among other goods, heading 4202, HTSUSA, provides for trunks, briefcases, wallets, and similar containers. The exemplars named in heading 4202 have in common the purpose of organizing, storing, protecting, and carrying various items. EN (c) to heading 4202 states, in part, that the heading does not cover:

> Articles which, although they may have the character of containers, are not similar to those enumerated in the heading, for example, book covers and reading jackets, file-covers, document-jackets * * * etc., and which are wholly or mainly covered with leather, sheeting of plastics, etc. Such articles fall in **heading 4205** if made of (or covered with) leather or composition leather, and in **other Chapters** if made of (or covered with) other materials. [Emphasis in original.]

For purposes of the outermost component at issue, such "other Chapters" include Chapter 39, HTSUSA, which provides for "Plastics and Articles Thereof." Heading 3926, HTSUSA, covers "Other articles of plastics and articles of other materials of headings 3901 to 3914." Although the language of the heading does not enumerate specific exemplars, the EN to heading 3926 state, in pertinent part, that the heading covers articles of plastics which include:

> * * * file-covers, document-jackets, book covers and reading jackets, and similar protective goods made by sewing or glueing together sheets of plastics.

In Headquarters Ruling Letter (HQ) 960835, dated June 29, 1999, this office classified a bifold cover (for a checkbook) with an exterior layer of cellular plastics not backed with textile fabric in subheading 3926.90.9880, HTSUSA. Like the "wallet" at issue herein, the interior sides of the bifold cover each had plastic slots or sleeves into which a checkbook or other types of books or pads could be inserted. To determine whether that article was similar to the containers enumerated in heading 4202, we first acknowledged that checkbook covers bear some resemblance to wallets of heading 4202, HTSUSA. Six digit subheadings 4202.32, 4202.31, and 4202.39, HTSUSA, cover articles of a kind normally carried in the pocket or handbag. The pertinent subheading EN states that:

> These subheadings cover articles of a kind normally carried in the pocket or in the handbag and include spectacle cases, note-cases (bill-folds), wallets, purses, key-cases, cigarette-cases, cigar-cases, pipe-cases and tobacco-pouches.

In HQ 960835, it was noted that on June 21, 1995, this office had published a General Notice in the CUSTOMS BULLETIN, Volume 29, Number 25, concerning goods identified as "Wallets on a String." The attributes of articles of a kind normally carried in the pocket or in the handbag were discussed. The notice stated in pertinent part that:

> Such articles include wallets, which may be described as *flat* cases or containers fitted to hold credit/identification cards, paper currency, coins and in some instances a checkbook holder. Articles meeting this description which also possess a detachable carrying strap have been classified as flatgoods.

In recounting that checkbook covers were not normally fitted to hold paper currency or coins, and that wallets could be fitted to hold checkbook holders, we found indications that wallets and checkbook covers are separate and distinct commodities. We further determined that, unlike wallets, checkbook covers are specifically designed to accommodate articles of stationery, e.g., a book of checks and a register for recording details concerning each check written. We found that the bifold checkbook cover was not similar to a wallet or other containers enumerated in heading 4202, and was not classifiable in that heading.

In this case, the outermost component is essentially a protective cover for the articles of stationery it incorporates (a check register, a telephone address book, and a notebook) and a pen which renders the articles of stationery more useful. Although this component is also capable of holding a book of checks, the usefulness of such books depends upon their printed customized information (e.g., name, address, and other information pertinent to both the account owner and the financial institution) and checkbooks are not normally included in imported sets of this type. Although the outer component at issue is fitted with two small sleeves for cards or photos (features normally associated with a wallet), the two larger sleeves are not suitable fittings for carrying coins and are not designed or intended to withstand the repetitive manipulation associated with carrying currency. We thus find that the article is similar to a cover for a checkbook and, although it is not composed of paper or paperboard, to other articles of stationery. The component is not similar to a wal-

let or other containers of heading 4202, HTSUSA. If separately imported, the cover would be classified in subheading 3926.90.9880, HTSUSA.

The legal notes to chapter 48, HTSUSA, do not exclude covers found to be classifiable under heading 3926, HTSUSA. While we agree with the determination in NY E82903 that the group of components comprises a set, we note that three of the five separable components are classifiable under heading 4820, while the other two components (i.e., the pen and the cover) are designed to write on, and to cover/protect, the articles of stationery, respectively. In light of the roles played by the stationery, it is clear that the essential character of the set will be imparted by a component that is classifiable under heading 4820, HTSUSA. Classification of the complete good cannot be determined by GRI 1, however, i.e., according to the terms of heading 4820, because the components are classifiable in different subheadings of that heading.

GRI 6 addresses the classification of goods that are classifiable in different subheadings within the same heading. In pertinent part, GRI 6 states:

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules [i.e., GRI 1 through GRI 5], on the understanding that only subheadings at the same level are comparable. * * *

At the six digit subheading level, each of the three stationery components is classifiable in subheading 4820.10, HTSUSA, which provides, in pertinent part, for: "* * * **Registers,** account books, **notebooks,** order books, receipt books, letter pads, memorandum pads, **diaries and similar articles.**" (Emphasis added.)

We continue classification analysis of the three components using the remaining applicable GRI. In pertinent part, GRI 2(b) states:

> The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

GRI 3(a) directs that the headings [and by operation of GRI 6 above, the subheadings] are regarded as equally specific when they each refer to part only of * * * the items in a set put up for retail sale. GRI 3(a) requires that the subheadings be regarded as equally specific despite any disparity in their texts.

At the eight digit subheading level, the three components are classifiable in two different subheadings, i.e., 4820.10.20, HTSUSA, which provides for "* * * Diaries, **notebooks** and **address books,** bound; memorandum pads, letter pads and similar articles," and 4820.10.40, HTSUSA, the text of which reads "Other." Since the exemplars of six digit subheading 4820.10, HTSUSA, are completely provided for in only two, eight digit subheadings, subheading 4820.10.40, HTSUSA, actually provides for all of the named exemplars of subheading 4820.10, that are not named in subheading 4820.10.20, HTSUSA. By process of elimination, the "Other" articles provided for in subheading 4820.10.40, HTSUSA, are **"Registers,** account books, order books, receipt books and similar articles." (Emphasis added.)

We next look to GRI 3(b), which states, in part, that:

> * * * goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

At GRI 3(b), the checkbook organizer set is classified as if it consists of the component or components that give the set its essential character. The terms of the competing subheadings might suggest that the provision which includes two of the three components more specifically describes the set, but neither the notebook nor the address book are more specific than the register, and neither of the two components appears to give the complete set its essential character. We therefore look next to Explanatory Note VIII to GRI 3(b), which states:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

In viewing the nature of the checkbook organizer and the role of the remaining stationery components to the use of the set, we are mindful that although the notebook and the address book are classifiable in the same eight digit subheading, each is only one half the size of the checkbook register. We note that the cover of the "checkbook organizer" conforms in

size to the checkbook register, and that it is able and likely intended to incorporate a personalized checkbook, the individual checks of which a checkbook register is designed and intended to record and describe. We thus find that the checkbook register imparts the set's essential character, and that the checkbook organizer is classified in subheading 4820.10.4000, HTSUSA. For additional Customs rulings classifying sets of similar components, see NY C87832 (dated May 19, 1998), NY C81905 (dated November 25, 1997), and NY 812474 (dated July 18, 1995).

Holding:

NY E82903, dated June 16, 1999, is hereby revoked.

The trifold article identified as the "Checkbook Organizer" is classified in subheading 4820.10.4000, HTSUSA, which provides, in part, for "* * * Registers, account books * * * order books, receipt books * * * and similar articles: Other." The general column one duty rate is free.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

PROPOSED REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF WOODEN FLOOR SCREENS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation and modification of tariff classification ruling letters and treatment relating to the classification of wooden floor screens.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke or modify nine rulings relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of wooden floor screens. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before September 13, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, NW, Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Steven Bratcher, Textiles Branch: (202) 572–8757.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke six rulings and to modify three rulings relating to the tariff classification of wooden floor screens. Although in this notice Customs is specifically referring to eight New York Ruling Letters (NY) and one Headquarters Ruling Letter (HQ), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to this notice.

The six rulings which Customs intends to revoke are HQ 961937, dated December 8, 1998, NY 857911, dated December 7, 1990, NY 886597, dated June 15, 1993, NY C82177, dated December 16, 1997, NY C85674, dated April 16, 1998 and NY F80426, dated December 28, 1999. The three rulings which Customs intends to modify are NY 855306, dated August 22, 1990 and NY E86014 and E86030, both dated September 20, 1999. In all nine of these rulings, wooden floor screens were classified under subheading 4421.90.4000, HTSUS, which provides for "Other articles of wood; Other; Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware: Other." These rulings are set forth as Attachments A through I" to this document, in the order that they appear, above.

Customs has now determined that the subject articles are not classifiable under this subheading, or even under heading 4421, HTUSA, which provides for other articles of wood. Rather, such wooden screens are classified at subheading 9403.60.8080, HTSUSA, as wooden furniture.

Attached are the following proposed Headquarters Rulings revoking and modifying the identified prior rulings: Proposed HQ 964909, revoking HQ 961937 (Attachment J), HQ 964910, revoking NY 857911 (Attachment K), HQ 964911, modifying NY 855306, (Attachment L), HQ 964912, revoking NY 886597 (Attachment M), HQ 964913, revoking NY C82177 (Attachment N), HQ 964914, revoking NY C85674 (Attachment O), HQ 964915, revoking NY F80426 (Attachment P) and HQ 964916 which modifies both NY E86014 and NY E86030 (Attachment Q).

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke or modify the subject prior rulings, as appropriate, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in the proposed Headquarters Rulings 964909 through 964916, *supra*. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 26, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 8, 1998.

CLA-2 RR:TC:TE 961937 SS
Category: Classification
Tariff Nos. 4421.90.4000

MS. PAULA M. CONNELLY, ESQUIRE
MIDDLETON & SHRULL
44 Mall Road, Suite 208
Burlington, MA 01803-4530

Re: Reconsideration of NY C84340; Wooden Folding Room Screens.

DEAR MS. CONNELLY:

This is in response to your letter, dated May 4, 1998, on behalf of your client, FETCO International of Randolph, Massachusetts, requesting reconsideration of New York Ruling Letter (NY) C84340, dated March 11, 1998, regarding classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of wooden folding room screens styles 4160, 4161, 4162, 415500RS, 415600RS and 415700RS. The room screens are imported from China or Thailand. A physical sample was not provided with the request for reconsideration because of its size and weight. Information from the FETCO catalog was submitted to this office.

Facts:

A copy of the page from the FETCO catalog shows styles 4160, 4161 and 4162 and describes them as follows:

> "FOLDING ROOM SCREEN Our 5'9" tall folding three-panel wooden room screen decorates any setting with 15 favorite images. Holds 8x10 photographs or art prints. Choose cherry or black finish."

The Folding Room Screens consist of three wooden panels connected by metal hinges. Each panel incorporates five openings which may be used to display photographs, prints, or similar objects. Each opening consists of a piece of clear glass and a removable backing. The backing is removed to insert a photograph or print and is then reattached to the room screen to hold the photograph or print in place. The Folding Room Screens measure approximately 70 inches in height and 35 inches in width when fully extended. The room screens can display a total of fifteen 8" x 10" photographs or prints.

A drawing was submitted with the original request for styles 415500RS, 415600RS and 415700RS which are referred to as "Floating Room Screens". The Floating Room Screens are constructed similar to the Folding Room Screens except that the backing consists of textured glass.

In NY C84340, the room screens were classified under 4421.90.4000, HTSUSA, as wood screens. The ruling determined that the merchandise was constructed, sold, bought and known as screens. The essential character of the article was determined to be that of a screen which decorates a room setting; the frame-like openings were merely features of the screen. You disagree with this determination. In your opinion, the subject merchandise is designed for and used to display photographs and would be classified under 4414.00.0000, HTSUSA, as wooden frames for photographs or similar objects.

Issue:

Whether the subject room screens are properly classifiable under 4421.90.4000, HTSUSA, which provides for wooden screens, or under 4414.00.0000, HTSUSA which provides for wooden frames?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings, and any relative section or chapter notes and, provided the head-

ings or notes do not otherwise require, according to remaining GRIs taken in order. The provisions under consideration are as follows:

"4421.90.4000 Other articles of wood; Other; Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware: Other."

"4414.00.0000 Wooden Frames for paintings, photographs, mirror or similar objects"

There are no section notes for Section IX and the chapter notes for Chapter 44 do not provide any guidance on the classification of the merchandise. The Explanatory Notes to the Harmonized Commodity Description and Coding System ("EN") constitute the official interpretation of the scope and content of the nomenclature at the international level. Unfortunately, the ENs in this case do not assist in determining the proper classification. Thus, the question boils down to whether the merchandise is a wood screen or a wood frame. It is Customs position that the article is a wood screen.

We agree that HTSUSA 4414.00.0000 is an eo nomine provision covering wooden frames for paintings, photographs, mirrors or similar objects. You contend that the room screen frames are designed for and used to display photographs and similar articles and thus should be considered wooden frames for tariff purposes. However, the fact that this frame-like article is a room screen cannot be ignored. Mere observation of the article reveals that it is a room screen that features openings for photographs or similar articles. It is designed to be free-standing like a room screen, it is the approximate size of typical room screens and folds in sections like a room screen. It simply looks and feels like a room screen. The openings for photographs or prints are merely features of the room screen. Openings for photographs which are incorporated into a room screen do not convert a room screen to a photo frame.

The Explanatory Note to Heading 4421, HTSUS, states that the heading covers all articles of wood other than those specified or included in preceding headings. You assert that the room screens cannot be classified in Heading 4421, HTSUS, because the room screens are provided for in a more specific section of Chapter 44, namely Heading 4414, HTSUS, the provision for wooden frames. We disagree. The wooden frame provision is not more specific. The merchandise is a wood screen, not a wooden frame. Accordingly, it cannot be classified under the heading for wooden frames. Thus, the merchandise is not precluded from classification under Heading 4421, HTSUS. Having determined that Heading 4421, HTSUS, is applicable, a review of the subheadings reveals that subheading 4421.90.4000, HTSUSA, specifically provides for wood screens. Accordingly, classification under subheading 4421. 90.4000, HTSUSA, is proper.

You attempt to distinguish several rulings on the grounds that the decorative screens involved were used primarily to divide or conceal an area of a room while your screens are used primarily to display photographs. New York Ruling Letter (NY) 857911, dated December 7, 1990, describes the "decorative wood screen" at issue as follows:

> "The ruling was requested on a floor standing decorative screen. The screen is composed of three panels which are hinged together. Each panel measures 18 inches wide by 80 inches high. The screen is made of wood and decoratively covered with leather."

Although the ruling mentioned that the screens function was to conceal, shade or divide an area, it also mentioned that they were highly decorative. The screens were classified under 4421.90.4000, HTSUSA. Notably, the screens were the same shape and approximate size as the screens at issue. Furthermore, the screens featured leather to make them more decorative just as the screens in the present case feature openings for photos to make them more decorative. NY 855306, dated August 22, 1990, also involved screens of similar shape and size. The screens were composed of four wooden panels measuring 20″ wide x 72″ high. Despite the lack of decoration or features, the screens were also classified under 4421.90.4000, HTSUSA. In NY 886597, dated June 15, 1993, Customs classified Coromandel screens which consisted of four or six lacquered and painted wood panels measuring 72″ wide x 84″ high under 4421.90.4000, HTSUSA. It was noted that screens typically have a "framed construction". Applying the rationale of these cases to the present case, the decorative features of the screen, namely the openings for photographs or prints, do not change the classification of the screen. It is Customs' position that the openings merely serve to enhance the decorative nature of the screens. The screens are still wood screens classifiable under 4421.90.4000, HTSUSA.

Headquarters is in agreement with the National Commodity Specialist that the screens are constructed, bought, and known as screens. Accordingly, an essential character analysis is not applicable. You contend that "the essential character of the screen is imparted by

the frame openings". Although we agree that the frame-like openings are a unique feature of the screen, they do not confer essential character to an article that has already been determined to be a screen.

You contend that the screen is primarily sold and purchased to display photographs. This contention completely ignores the shape, size and nature of the article. The purchaser of this article wants something more than several picture frames or a big picture frame; he wants the shape, size and free-standing nature of a room screen. While we agree that a consumer may set the screen against a wall or in a corner, we disagree with your statement that it would not be purchased to divide or conceal an area. Furthermore, its chief use is not simply to display photographs, it is to decorate a room. You contend that these screens are distinguishable from the byobu types of screens historically classified under Heading 4421, HTSUS, on the grounds that the byobu screens do not serve any other purpose than to decorate or divide off an area of room. This screen also decorates and divides; it decorates with photographs or prints rather than rice paper or paintings. In fact, the screen seems to mimic the traditional Japanese shoji screen by simply replacing the delicate rice paper panels with openings for photos. The fact that the screens are used as a type of photo frame is not sufficient to establish that the articles are not screens, when other factors, such as their shape, construction, and resemblance to the well-known oriental folding screen proclaim that they are screens properly classifiable under Heading 4421, HTSUS.

In Headquarters Ruling Letter (HQ) 086047, dated March 1, 1990, and HQ 087170, dated September 14, 1990, Customs dealt with hand painted Japanese folding screens. The screens were the folding "byobu" type comprised of wooden frames covered with rice paper and held together with paper hinges. Sumi ink and water soluble colors were used to paint the screens. The screens were 60 to 80 years old. The sizes of the screens ranged from 60″ x 60″ to 70″ x 146″. The screens were initially classified under Heading 4421, HTSUS. However, supplemental information was provided and the ruling was reconsidered. The Importer showed that he imported special screen hanging hardware and supplies with every screen so that the screens could be hung on a wall; no two screens were alike; the screens were not signed by the artist because a master painter of a school would not sign a screen in deference to the leader of school; the screens were of high value; and one screen was in the permanent collection of an Asian Art Museum. Customs felt the screens were unique works of art designed to be used as wall hangings rather than screens and revoked the prior ruling. The screens were reclassified under subheading 9701.10.0000, HTSUSA, which provides for paintings, pastels, drawings, executed entirely by hand. Applying this rational to the present case, it is clear that there is a high threshold for removing a wood screen from the subheading specifically covering wood screens. Furthermore, until that high threshold is met, it does not matter that a wood screen is purchased for some decorative quality such as a painting or openings for photos; it does not deprive the screen of its status as a wood screen. The present screen is appropriately classified under subheading 4421.90.4000, HTSUSA.

Customs has ruled on virtually the same screens. In NY C82177, dated December 16, 1997, Customs classified the "Sona Floor Screen Frame" under 4421.90.4000, HTSUSA. The merchandise at issue was a floor standing wood screen measuring 35 inches wide by 69 inches high comprised of three panels each containing five 8 by 10 size picture frames in a row from top to bottom. The picture frames were described as unique and prominent features of the screen. The importer also suggested Heading 4414, HTSUSA. Customs responded that the screen was not just a large multiple picture frame; it was a completely different article, namely, a floor standing screen that incorporated photo frames in its design. Additionally, in NY C85674, dated April 16, 1998, a "photo gallery floor screen" was classified under 4421.90.4000, HTSUSA. It was described as a decorative, floor-standing article consisting of three upright wooden panels attached to each other with hinges. Each panel was approximately 11½ inches wide by 69 inches high, and consisted of a wood framework surrounding a vertical array of five identical rectangular openings intended to accommodate photographs for display. Each opening was equipped with a pane of glass, paper mat and removable fiberboard back. Applying these cases to the present case, which concerns a virtually identical screen, the proper classification is under 4421.90.4000, HTSUSA.

You contend that the screens are frames because most of the screens are sold to the stationary/frame departments of stores and they are advertised with frames. In the first unidentified advertisement, the screen is under a heading for "floor screens" and is designated as a "three panel floor screen". The photo frames in the advertisement, howev-

er, are referred to specifically as "frames" in the descriptions. It is also worthy to note that the floor screen costs approximately ten times as much as the most expensive frame advertised. Filene's advertisement calls the screen a "photo screen". The other frames in the advertisement are specifically called "frames" while there is no mention of the term "frame" in the screen portion of the ad. In this lay out the screen costs approximately twenty times as much as the most expensive frame. The March Macy's advertisement calls the screen "Fetco tri-panel floor screen" and states that the "screen holds fifteen 8x10 photos". The other photo frames in the ad are specifically referred to as "wood frames", "glass frames", etc.. In Macy's April advertisement the screen is located under a heading for "floor screens" and is called a "three panel wood floor screen". Other frames in the ad, even the "spinner", are specifically called "frames". Kohl's March ad calls it a "photo screen" and states the "tri-panel screen holds several 8x10 photos". Kohl's April advertisement calls it simply a "screen" and describes it as a "contemporary and unique way to show your treasured photos". Although most of the ads do state the screen holds photographs, none label it a "frame" and all designate it a "screen". Accordingly, the advertisements do support the finding that the screens are constructed, sold, bought and known as screens.

Holding:

The classification of the wood room screens under 4421.90.4000, HTSUSA, was correct.

The screens are classifiable in subheading 4421.90.4000, HTSUSA, which provides for Other articles of wood: Other: Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware: Other. The duty rate is 5.7 ad valorem.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, December 7, 1990.

CLA44:S:N:N1:230 857911
Category: Classification
Tariff No. 4421.90.4000

MS. CORINNE DARNELL
THE HIPAGE COMPANY, INC.
P. O. Box 19143
Charlotte, NC 28219

Re: The tariff classification of a decorative wood screen from the Philippines.

DEAR MS. DARNELL:

In your letter dated October 31, 1990, which was received in the office of the District Director of Customs at Wilmington, North Carolina on November 13, 1990, you requested a tariff classification ruling. The request was made on behalf of your customer, Henredon Furniture Industries, Inc.

The ruling was requested on a floor standing decorative screen. The screen is composed of three panels which are hinged together. Each panel measures 18 inches wide by 80 inches high. The screen is made of wood and decoratively covered with leather.

Decorative screens such as this one are not classifiable as furniture, which are movable articles used mainly with a utilitarian purpose to equip dwellings, offices, vehicles and similar places. These screens are like the wood blinds, shutters, screens and shades, which are provided for elsewhere in the tariff. The function that the screens provide is one of concealing or shading or dividing an area. At the same time, they are highly decorative.

The applicable subheading for the decorative wood screen will be 4421.90.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for wood blinds, shutters, screens and shades, all the foregoing with or without their hardware, other. The rate of duty will be 8 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 15, 1993.

CLA–2–44:S:N:N8:230 886597
Category: Classification
Tariff No. 4421.90.4000

MS. PATTI VAN DE WARK
MONDAY'S WHOLESALE
1401 Martin Avenue
Santa Clara, CA 95050–2614

Re: Tariff classification of Coromandel screens from China or Hong Kong.

DEAR MS. VAN DE WARK:

In your letter dated May 18, 1993 you requested a tariff classification ruling.

The ruling was requested on Coromandel screens. The screens consist of floor-standing 72 inch high or 84 inch high hinged panels in sets of four or six. The panels are made of wood and are lacquered and painted on both sides. They are used to decoratively divide a room or conceal off an area.

The Coromandel screens function as screens within the common definition of the term. A screen is defined as something that shelters, protects or conceals. The American Heritage Dictionary of the English Language (New College Edition) defines a screen as follows:

> n. 1. A movable device especially a framed construction, designed to divide, conceal, or protect, as a hinged or sliding room divider.

The wood blinds, shutters, screens and shades of subheadings 4421.90.3000 and 4421.90.4000, Harmonized Tariff Schedules of the United States Annotated (HTSUSA), all function similarly in that they conceal or protect an area. However, there is no language in the applicable heading or subheadings which limits these functions to windows.

The applicable subheading for the Coromandel screens will be 4421.90.4000, HTSUSA, which provides for wood blinds, shutters, screens and shades, all the foregoing with or without their hardware; other. The rate of duty will be 8 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, December 16, 1997.

CLA-2-44:RR:NC:2:230 C82177
Category: Classification
Tariff No. 4421.90.4000

MR. KARL F. KRUEGER
AEI-CARR CUSTOMS BROKERAGE SERVICES
1600 West Lafayette
Detroit, MI 48216

Re: The tariff classification of a wood floor screen with picture frames from China or Thailand.

DEAR MR. KRUEGER:

In your letter dated November 18, 1997, on behalf of your client, Umbra U.S.A. Inc., you requested a tariff classification ruling.

The ruling was requested on a product named the "Sona Floor Screen Frame." Descriptive literature in a catalogue and an advertising flyer was submitted. The floor screen frame is a three panel floor standing wood screen measuring 35 inches wide by 69 inches high. Each panel has five 8 by 10 size picture frames in a row from the top to the bottom. The picture frames are a unique and prominent feature of the screen.

You suggested classification in subheading 4414.00.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for wooden frames for paintings, photographs, mirrors or similar objects. You noted that the Explanatory Notes state that heading 4414 covers wooden frames of all shapes and dimensions. However, this product is not just a large multiple picture frame. It is a separate different article, namely, a floor standing screen which incorporates picture frames in its design. The essential character of this combination article is imparted by the screen because the screen provides the primary purpose of this product. The product is shown in the catalogue functioning as a screen; that is, screening off a corner. A person buying this product must first use it as a screen and then secondarily as a multiple picture frame unit.

The applicable subheading for the Sona Floor Screen Frame will be 4421.90.4000, HTSUSA, which provides for wood blinds, shutters, screens and shades, all the foregoing with or without their hardware; other. The rate of duty will be 6.3 percent ad valorem. Effective January 1, 1998, the rate of duty will be 5.7 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Garretto at 212–466–5779.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 16, 1998.
CLA–2–44:RR:NC:SP:230 C85674
Category: Classification
Tariff No. 4421.90.4000

MS. SHELLY PAPPAS
VALUE CITY IMPORTS
1800 Moler Road
Columbus, OH 43207

Re: The tariff classification of a wooden floor screen from Taiwan.

DEAR MS. PAPPAS:

In your letter dated March 13, 1998, you requested a tariff classification ruling.

A sample identified as a "photo gallery floor screen" was submitted and is being returned to you as requested. It is a decorative, floor-standing article consisting of three upright wooden panels (each with two stubby legs) attached to each other with hinges. Each panel is about 11½ inches wide by 69 inches high, and consists of a wood framework surrounding a vertical array of five identical rectangular openings intended to accommodate photographs (up to 8″ x 10″) for display. Each opening is in turn equipped with a pane of glass, paper mat and removable fiberboard back.

The applicable subheading for the "photo gallery floor screen" will be 4421.90.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for other (than certain enumerated) wood blinds, shutters, screens and shades. The rate of duty will be 5.7%.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Garretto at 212–466–5779.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, December 28, 1999.
CLA–2–44:RR:NC:2:230 F80426
Category: Classification
Tariff No. 4421.90.4000

MR. ORLANDO RODRIGUEZ
ALMACENES PITUSA
P.O. Box 839
Hato Rey Station
San Juan, PR 00919–0839

Re: The tariff classification of wood folding screens with photo frames from Thailand.

DEAR MR. RODRIGUEZ:

In your letter dated December 2, 1999 you requested a tariff classification ruling.

The ruling was requested on three different photo frame screens made of solid rubberwood. Product information sheets with photocopied pictures were submitted.

The first item (#B–35–C3035) is a single photo frame panel with a wood stick easel. The panel measures 8 inches wide by 34 inches high and is designed to hold six 6″ x 4″ photographs vertically in a row.

The second item (#B–35–C3038) is a two panel hinged folding screen with feet. Each panel measures 8 inches wide by 56 inches high and is designed to hold six 5″ x 7″ photographs.

The third item (#B–35–C3003) is a three panel hinged folding screen with feet. Each panel measures 7 inches wide by 43 inches high and is designed to hold five 5″ x 7″ photographs.

The applicable subheading for the two panel folding screen (#B–35–C3038) and the three panel folding screen (#B–35–C3003) will be 4421.90.4000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for wood blinds, shutters, screens and shades, all the foregoing with or without their hardware; other. The rate of duty will be 5.1 percent ad valorem. This rate will remain the same in the year 2000.

Your inquiry does not provide enough information to issue a classification ruling on the single panel frame (#B–35–C3035). Your request for a ruling for this item should include a sample and information as where this item is designed to be placed.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Garretto at 212–637–7009.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT G]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, August 22 1990.

CLA94:S:N:N1:233 855306
Category: Classification
Tariff No. 4421.90.4000 & 9403.60.8080

MS. LENA RAINBOW
ASSOCIATED MERCHANDISING CORPORATION
1440 Broadway
New York, NY 10018

Re: The tariff classification of a wooden screen and table from India.

DEAR MS. RAINBOW:

In your letter dated August 3, 1990, you requested a tariff classification ruling.

The furniture items are comprised of a hand made wooden screen and table. The screen style model #2010, is constructed from Sheesham wood which is an inferior quality rose wood. It has four panels each measuring 20″ W x 6 feet high. The table, style model #2011, is also made from Sheesham wood. It consists of an octagon shape top that seperates from the base and measures 21″ in diameter. The base measures 18″ high. Both screen and table are for household use and designed for placing on the floor or ground.

The applicable subheading for the hand made wooden screen will be 4421.90.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of wood: Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware, other. The duty rate will be 8 percent ad valorem. The applicable subheading for the hand made wooden table will be 9403.60.8080, HTSUSA, which provides for other wooden furniture, other. The duty rate will be 2.5 percent ad valorem.

Articles classifiable under subheading 9403.60.8080, HTSUSA, which are products of India are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT H]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, September 20, 1999.

CLA–2–44:RR:NC:SP:230 E86014
Category: Classification
Tariff No. 4421.90.4000 and 9403.80.6040

MS. BONNIE GULYAS
IMPORT CUSTOMS ANALYST–HOME & LEISURE DIVISION
J.C. PENNEY PURCHASING CORPORATION
P.O. Box 10001
Dallas, TX 75301–0001

Re: The tariff classification of screens (decorative room dividers) from Taiwan and China.

DEAR MS. GULYAS:

In your letter dated August 16, 1999, you requested a tariff classification ruling.

Photos of four items described as "floor-standing partitions" were submitted and will be retained for reference. All are folding, decorative screens, usually comprised of three panels (held together with metal hinges) but in some instances offered in larger versions having 4–6 panels.

Lot # 778–2295 consists of ramin wood panels, each of which has 4 rectangular openings in which 8" x 10" pictures may be displayed. Dimensions are 35.25" W x 60.25" H.

Lot # 946–0908 has solid pine wood panels. Dimensions are 59" W x 65" H.

The applicable subheading for lot numbers 778–2295 and 946–0908 will be 4421.90.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of wood: other (than certain enumerated) wood blinds, shutters, screens and shades, all the foregoing with or without their hardware. The rate of duty will be 5.1%.

Lot # 856–2787 features polyester/cotton fabric panels held within wooden frames. The fabric, which predominates with respect to surface area and appearance, will be considered the component that imparts the essential character of the article. Dimensions are 51" W x 71" H.

Lot # 778–9852 features canvas panels held within steel frames. The canvas predominates with respect to surface area and appearance, and will be considered the component that imparts the essential character of the article. Dimensions are 59" W x 71" H.

The applicable subheading for lot numbers 856–2787 and 778–9852 will be 9403.80.6040, HTS, which provides for household furniture of other (non-enumerated) materials. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Garretto at 212–637–7009.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT I]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, September 20, 1999.

CLA–2–44:RR:NC:SP:230 E86030
Category: Classification
Tariff No. 4421.90.4000,
9403.70.8010, and 9403.20.0010

MS. BONNIE GULYAS
IMPORT CUSTOMS ANALYST—HOME & LEISURE DIVISION
J.C. PENNEY PURCHASING CORPORATION
P.O. Box 10001
Dallas, TX 75301–0001

Re: The tariff classification of screens (decorative room dividers) from Taiwan and China.

DEAR MS. GULYAS:

In your letter dated August 16, 1999, you requested a tariff classification ruling.

Photos of five items described as "floor-standing partitions" were submitted and will be retained for reference. All are folding, 3-panel decorative screens, but you note that some of the models may also be offered in larger versions having 4–6 panels.

Lot # 778–8003 consists of continuous plywood panels, hand painted with a seaside picture, fastened together with metal hinges. Dimensions are 48.75″ W x 69″ H.

Lot # 946–0577 features a pine center panel resembling a door. The adjacent panels, attached with metal hinges, exhibit a pine framework having numerous rectangular openings filled in with decorative ironwork. Dimensions are 71.25″ W x 70″ H.

The applicable subheading for lot numbers 778–8003 and 946–0577 will be 4421.90.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of wood: other (than certain enumerated) wood blinds, shutters, screens and shades, all the foregoing with or without their hardware. The rate of duty will be 5.1%.

Lot # 246–2037 is of PVC plastic (frame, rails and slats) with metal hinges. Dimensions are 51″ W x 72″ H.

The applicable subheading for lot # 246–2037 will be 9403.70.8010, HTS, which provides for other furniture of plastics: household. The rate of duty will be free.

Lot # 946–0239 has panels consisting of an iron frame, filled in partially with decorative ironwork and partially with woven vegetable material. The iron will be considered the material that imparts the essential character to the whole. Dimensions are 66″ W x 71″ H.

The applicable subheading for lot # 946–0239 will be 9403.20.0010, HTS, which provides for other metal furniture * * * household. The rate of duty will be free.

Your inquiry does not contain sufficient information for us to rule on lot # 946–4611, which features rattan panels. If you wish to pursue a ruling on this product, please specify the nature of the rattan pieces (e.g., flat strips, round rods, etc.) and how they are constructed. Also, please identify the material(s) comprising the frame.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Garretto at 212–637–7009.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT J]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964909 STB
Category: Classification
Tariff No. 9403.60.8080 80

MS. PAULA M. CONNELLY, ESQUIRE
MIDDLETON & SHRULL
44 Mall Road, Suite 208
Burlington, MA 01803–4530

Re: Revocation of HQ 961937; Classification of Wooden Folding Room Screens as Other Furniture and Parts Thereof, Heading 9403, HTSUSA; Not as Other Articles of Wood: Not Heading 4421, HTSUSA.

DEAR MS. CONNELLY:

This letter is pursuant to Headquarter's reconsideration of Headquarters Ruling Letter (HQ) 961937, issued to you on behalf of your client, FETCO International, dated December 8, 1998 concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of wooden folding room screens.

This letter is to inform you that after review of that ruling, it has been determined that the classification of the wooden screens, in subheading 4421.90.4000, HTSUSA, is incorrect. As such, HQ 961937 is revoked pursuant to the analysis which follows below.

Facts:

In HQ 961937 (which was a reconsideration of New York Ruling Letter (NY) C84340), the items at issue were described, from a page of the FETCO catalog (styles 4160, 4161 and 4162) as follows:

> FOLDING ROOM SCREEN Our 5′9″ tall folding three-panel wooden room screen decorates any setting with 15 favorite images. Holds 8x10 photographs or art prints. Choose cherry or black finish.

The Folding Room Screens consist of three wooden panels connected by metal hinges. Each panel incorporates five openings which may be used to display photographs, prints, or similar objects. Each opening consists of a piece of clear glass and a removable backing. The backing is removed to insert a photograph or print and is then reattached to the room screen to hold the photograph or print in place. The Folding Room Screens measure approximately 70 inches in height and 35 inches in width when fully extended. The room screens can display a total of fifteen 8″ x 10″ photographs or prints.

A drawing was submitted with the original request for styles 415500RS, 415600RS and 415700RS which are referred to as "Floating Room Screens." The Floating Room Screens are constructed similar to the Folding Room Screens except that the backing consists of textured glass.

In NY C84340, the room screens were classified under 4421.90.4000, HTSUSA, as wood screens. The ruling determined that the merchandise was constructed, sold, bought and known as screens. The essential character of the article was determined to be that of a screen which decorates a room setting; the frame-like openings were merely features of the screen. This classification was affirmed in HQ 961937.

Issue:

What is the proper classification of the wooden folding floor screens under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, provided the headings or

notes do not otherwise require, according to the remaining GRIs taken in order. The provisions under consideration are as follows:

4421.90.4000	Other articles of wood; Other; Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware: Other.
9403.60.8080	Other furniture and parts thereof: Other wooden furniture: Other, Other.

Subheading 4421.90.4000, HTSUSA, is under consideration because that subheading specifically provides for, *inter alia*, wood screens. Subheading 9403.60.8080, HTSUSA, is under consideration because the subject screens are items normally considered to be "furniture." We note the following dictionary definitions:

> furniture (1)—* * * the movable articles, as tables, chairs, bedsteads, desks, cabinets, etc., required for use or ornament in a house, office, or the like. *The Random House Dictionary of the English Language*, the Unabridged Edition;
>
> furniture (2)—* * * (The prevailing sense.) Movable articles, whether useful or ornamental, in a dwelling-house, place of business, or public building. Formerly including also the fittings. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

We find that the subject screens fit these definitions of "furniture." They are movable and are constructed for placing on the floor. Their primary purpose is utilitarian, to partition a room or screen off a corner. Such screens are also used to display photographs and are used in both private dwellings and offices. We note that the above definitions are very similar to the more detailed definition of furniture provided at General Explanatory Note (A) to Chapter 94, which states as follows:

For the purposes of this Chapter, the term "furniture" means:

> (A) Any "movable" articles (**not included** under other more specific headings of the Nomenclature), which would have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes, restaurants, laboratories, hospitals dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be "movable" furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

In fact, certain types of screens, *i.e.*, "fire screens" and "draught screens" are even listed as exemplars of furniture in the Explanatory Notes to Heading 9403, HTSUSA. Additionally, it is relevant that screens themselves are usually defined as furniture, as seen in the following:

> Screens—* * * a piece of furniture consisting usually of an upright board or frame hung with leather, canvas, cloth, tapestry, or paper, or of two or more such boards or frames hinged together. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

Finally, we note that Customs has regularly classified screens of material other than wood as furniture in heading 9403, HTSUSA. *See* NY D88618, dated March 4, 1999, in which a single panel room screen, with a black iron frame, was classified in subheading 9403.20.0010, HTSUSA, the provision for metal furniture. *See also*, NY E86030, dated September 20, 1999, in which several multi-panel screens (non-wood) are classified as furniture, in various subheadings of 9403 depending on the materials of which they are constructed. The courts have also recognized that screens are types of furniture. *See Sanji Kobata v. United States*, 66 Cust. Ct. 341, C.D. 4213 (1971), in which the court stated that it considers screens to be articles of furniture.

Given the fact that screens, such as those at issue here, do constitute furniture, the decision must be made as to which of the two provisions of the HTSUSA, cited above, is the more appropriate provision of classification.

Pursuant to GRI 3(a), if a product is classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. This rule would seem to indicate classification under heading 4421 (Chapter 44) and the apparently more specific description provided in subheading

4421.90.4000, HTSUSA (wood screens). However, Explanatory Note II to GRI 3 states that:

> * * * the Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require.** For instance, Note 4(b) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.06 shall be classified in one of the former headings. Such goods are to be classified according to Note 4(b) to Chapter 97 and not according to this Rule.

(Emphasis from original.) In this instance, we must consider Note 1(o) to Chapter 44, which states as follows:

> 1. This Chapter does not cover:
>
> (o) Articles of Chapter 94 (for example, furniture, lamps and lighting fittings, prefabricated buildings);

Therefore, Note 1(o) to Chapter 44 precludes consideration of that chapter for purposes of the classification of the subject screens because it excludes from classification in Chapter 44 all articles of Chapter 94, which would include furniture. Classification in subheading 4421.90.4000, HTSUSA, cannot even be considered; only after determining that a product is classifiable under the heading should the subheadings be examined to find the correct classification of the merchandise. *See* GRI 1,6. *See also*, *American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922 (CIT 1998). Accordingly, the subject wooden folding screens should be classified in heading 9403, HTSUSA, as other furniture and parts thereof.

Holding:

The subject screens are classifiable in subheading 9403.60.8080, HTSUSA, which provides for Other furniture and parts thereof: Other wooden furniture: Other, Other. The duty rate is 1 percent ad valorem.

HQ 961937 and NY C84340, the ruling that HQ 961937 reconsidered and affirmed, are hereby revoked. In accordance with 19 U.S.C., Section 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT K]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964910 STB
Category: Classification
Tariff No. 9403.60.8080

MS. CORINNE DARNELL
THE HIPAGE COMPANY, INC.
P.O. Box 19143
Charlotte, NC 28219

Re: Revocation of NY 857911; Classification of a Decorative Wood Screen from the Philippines as Other Furniture and Parts Thereof, Heading 9403, HTSUSA; Not as Other Articles of Wood: Not Heading 4421, HTSUSA.

DEAR MS. DARNELL:

This letter is pursuant to Headquarter's reconsideration of New York Ruling Letter (NY) 857911, issued to you on behalf of your customer, Henredon Furniture Industries, Inc., dated December 7, 1990, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a decorative wood screen from the Philippines.

This letter is to inform you that after review of that ruling, it has been determined that the classification of the wooden screen, in subheading 4421.90.4000, HTSUSA, is incorrect. As such, NY 857911 is revoked pursuant to the analysis which follows below.

Facts:

In NY 857911, a ruling had been requested regarding a "floor standing decorative screen." The screen was described as being composed of three (3) panels which are hinged together. The dimensions of each panel were said to be eighteen (18) inches wide by eighty (80) inches high. The screen was further described as being made of wood and decoratively covered with leather.

Issue:

What is the proper classification of the subject screen under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, provided the headings or notes do not otherwise require, according to the remaining GRIs taken in order. The provisions under consideration are as follows:

4421.90.4000	Other articles of wood; Other; Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware: Other.
9403.60.8080	Other furniture and parts thereof: Other wooden furniture: Other, Other.

Subheading 4421.90.4000, HTSUSA, is under consideration because it specifically provides for, *inter alia*, wood screens. Subheading 9403.60.8080, HTSUSA, is under consideration because the subject screen is an item normally considered to be "furniture." We note the following dictionary definitions:

> furniture (1)—* * * the movable articles, as tables, chairs, bedsteads, desks, cabinets, etc., required for use or ornament in a house, office, or the like. *The Random House Dictionary of the English Language*, the Unabridged Edition;
>
> furniture (2)—* * * (The prevailing sense.) Movable articles, whether useful or ornamental, in a dwelling-house, place of business, or public building. Formerly including also the fittings. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

We find that the subject screen fits these definitions of "furniture." It is movable and is constructed for placing on the floor. Its primary purpose is utilitarian, to partition a room or screen off a corner. Such screens are also used to display photographs and are used in both private dwellings and offices. We note that the above definitions are very similar to the more detailed definition of furniture provided at General Explanatory Note (A) to Chapter 94, which states as follows:

> For the purposes of this Chapter, the term "furniture" means:
>
> (B) Any "movable" articles (**not included** under other more specific headings of the Nomenclature), which would have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes, restaurants, laboratories, hospitals dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be "movable" furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

In fact, certain types of screens, *i.e.*, "fire screens" and "draught screens" are even listed as exemplars of furniture in the Explanatory Notes to Heading 9403, HTSUSA. Additionally, it is relevant that screens themselves are usually defined as furniture, as seen in the following:

> Screens—* * * a piece of furniture consisting usually of an upright board or frame hung with leather, canvas, cloth, tapestry, or paper, or of two or more such boards or

frames hinged together. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

Finally, we note that Customs has regularly classified screens of material other than wood as furniture in heading 9403, HTSUSA. *See* NY D88618, dated March 4, 1999, in which a single panel room screen, with a black iron frame, was classified in subheading 9403.20.0010, HTSUSA, the provision for metal furniture. *See also*, NY E86030, dated September 20, 1999, in which several multi-panel screens (non-wood) are classified as furniture, in various subheadings of 9403 depending on the materials of which they are constructed. The courts have also recognized that screens are types of furniture. *See Sanji Kobata v. United States*, 66 Cust. Ct. 341, C.D. 4213 (1971), in which the court stated that it considers screens to be articles of furniture.

Given the fact that screens, such as the one at issue here, do constitute furniture, the decision must be made as to which of the two provisions of the HTSUSA, cited above, is the more appropriate provision of classification.

Pursuant to GRI 3(a), if a product is classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. This rule would seem to indicate classification under heading 4421 (Chapter 44) and the apparently more specific description provided in subheading 4421.90.4000, HTSUSA (wood screens). However, Explanatory Note II to GRI 3 states that:

> * * * the Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require.** For instance, Note 4(b) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.06 shall be classified in one of the former headings. Such goods are to be classified according to Note 4(b) to Chapter 97 and not according to this Rule.

(Emphasis from original.) In this instance, we must consider Note 1(o) to Chapter 44, which states as follows:

> 1. This Chapter does not cover:
>
> (o) Articles of Chapter 94 (for example, furniture, lamps and lighting fittings, prefabricated buildings);

Therefore, Note 1(o) to Chapter 44 precludes consideration of that chapter for purposes of the classification of the subject screen because it excludes from classification in Chapter 44 all articles of Chapter 94, which would include furniture. Classification in subheading 4421.90.4000, HTSUSA, cannot even be considered; only after determining that a product is classifiable under the heading should the subheadings be examined to find the correct classification of the merchandise. *See* GRI 1,6. *See also*, *American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922 (CIT 1998). Accordingly, the subject screen should be classified in heading 9403, HTSUSA, as other furniture and parts thereof.

Holding:

The subject screen is classifiable in subheading 9403.60.8080, HTSUSA, which provides for Other furniture and parts thereof: Other wooden furniture: Other, Other. The duty rate is 1 percent ad valorem.

NY 857911 is hereby revoked. In accordance with 19 U.S.C., Section 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT L]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964911 STB
Category: Classification
Tariff No. 9403.60.8080

MS. LENA RAINBOW
ASSOCIATED MERCHANDISING CORPORATION
1440 Broadway
New York, NY 10018

Re: Modification of NY 855306; Classification of a Wooden Screen from India as Other Furniture and Parts Thereof, Heading 9403, HTSUSA; Not as Other Articles of Wood: Not Heading 4421, HTSUSA.

DEAR MS. RAINBOW

This letter is pursuant to Headquarter's reconsideration of New York Ruling Letter (NY) 855306, dated August 22, 1990, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a wooden screen from India.

This letter is to inform you that after review of that ruling, it has been determined that the classification of the wooden screen, in subheading 4421.90.4000, HTSUSA, is incorrect. As such, NY 855306, as it concerns the wooden screen, is modified pursuant to the analysis which follows below. Note that NY 855306 also classified a table from India, in subheading 9403.60.8080 80, HTSUSA; the classification of the table is not addressed in, and not affected by, this ruling.

Facts:

In response to your original letter requesting a tariff classification ruling, we considered the proper tariff classification of a hand-made wooden screen and table. The screen was described as being style model no. 2010, and as being constructed from Sheesham wood, a type of rosewood. It was further described as having four panels, each measuring 20 inches wide and 6 feet in height. The table was also described and both screen and table were said to be for household use and designed for placing on the floor or ground.

Issue:

What is the proper classification of the subject screen under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, provided the headings or notes do not otherwise require, according to the remaining GRIs taken in order. The provisions under consideration are as follows:

4421.90.4000	Other articles of wood; Other; Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware: Other.
9403.60.8080	Other furniture and parts thereof: Other wooden furniture: Other, Other.

Subheading 4421.90.4000, HTSUSA, is under consideration because it specifically provides for, *inter alia*, wood screens. Subheading 9403.60.8080, HTSUSA, is under consideration because the subject screen is an item normally considered to be "furniture." We note the following dictionary definitions:

> furniture (1)—* * * the movable articles, as tables, chairs, bedsteads, desks, cabinets, etc., required for use or ornament in a house, office, or the like. *The Random House Dictionary of the English Language*, the Unabridged Edition;
>
> furniture (2)—* * * (The prevailing sense.) Movable articles, whether useful or ornamental, in a dwelling-house, place of business, or public building. Formerly including also the fittings. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

We find that the subject screen fits these definitions of "furniture." It is movable and is constructed for placing on the floor. Its primary purpose is utilitarian, to partition a room or screen off a corner. Such screens are also used to display photographs and are used in both private dwellings and offices. We note that the above definitions are very similar to the more detailed definition of furniture provided at General Explanatory Note (A) to Chapter 94, which states as follows:

> For the purposes of this Chapter, the term "furniture" means:
>
> (B) Any "movable" articles (**not included** under other more specific headings of the Nomenclature), which would have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes, restaurants, laboratories, hospitals dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be "movable" furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

In fact, certain types of screens, *i.e.*, "fire screens" and "draught screens" are even listed as exemplars of furniture in the Explanatory Notes to Heading 9403, HTSUSA.

Additionally, it is relevant that screens themselves are usually defined as furniture, as seen in the following:

> Screens—* * * a piece of furniture consisting usually of an upright board or frame hung with leather, canvas, cloth, tapestry, or paper, or of two or more such boards or frames hinged together. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

Finally, we note that Customs has regularly classified screens of material other than wood as furniture in heading 9403, HTSUSA. *See* NY D88618, dated March 4, 1999, in which a single panel room screen, with a black iron frame, was classified in subheading 9403.20.0010, HTSUSA, the provision for metal furniture. *See also*, NY E86030, dated September 20, 1999, in which several multi-panel screens (non-wood) are classified as furniture, in various subheadings of 9403 depending on the materials of which they are constructed. The courts have also recognized that screens are types of furniture. *See Sanji Kobata v. United States*, 66 Cust. Ct. 341, C.D. 4213 (1971), in which the court stated that it considers screens to be articles of furniture.

Given the fact that screens, such as the one at issue here, do constitute furniture, the decision must be made as to which of the two provisions of the HTSUSA, cited above, is the more appropriate provision of classification.

Pursuant to GRI 3(a), if a product is classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. This rule would seem to indicate classification under heading 4421 (Chapter 44) and the apparently more specific description provided in subheading 4421.90.4000, HTSUSA (wood screens). However, Explanatory Note II to GRI 3 states that:

> * * * the Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require.** For instance, Note 4(b) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.06 shall be classified in one of the former headings. Such goods are to be classified according to Note 4(b) to Chapter 97 and not according to this Rule.

(Emphasis from original.) In this instance, we must consider Note 1(o) to Chapter 44, which states as follows:

> 1. This Chapter does not cover:
>
> (o) Articles of Chapter 94 (for example, furniture, lamps and lighting fittings, prefabricated buildings);

Therefore, Note 1(o) to Chapter 44 precludes consideration of that chapter for purposes of the classification of the subject screen because it excludes from classification in Chapter 44 all articles of Chapter 94, which would include furniture. Classification in subheading 4421.90.4000, HTSUSA, cannot even be considered; only after determining that a product is classifiable under the heading should the subheadings be examined to find the correct

classification of the merchandise. *See* GRI 1,6. *See also, American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922 (CIT 1998). Accordingly, the subject screen should be classified in heading 9403, HTSUSA, as other furniture and parts thereof.

Holding:

The subject screen is classifiable in subheading 9403.60.8080, HTSUSA, which provides for Other furniture and parts thereof: Other wooden furniture: Other, Other. The duty rate is 1 percent ad valorem.

NY 855306, classifying the subject screen in heading 4421, HTSUSA, is hereby modified. In accordance with 19 U.S.C., Section 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT M]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964912 STB
Category: Classification
Tariff No. 9403.60.8080

MS. PATTI VAN DE WARK
MONDAY'S WHOLESALE
1401 Martin Avenue
Santa Clara, CA 95050–2614

Re: Revocation of NY 886597; Classification of Coromandel Screens from China or Hong Kong as Other Furniture and Parts Thereof, Heading 9403, HTSUSA; Not as Other Articles of Wood: Not Heading 4421, HTSUSA.

DEAR MS. VAN DE WARK:

This letter is pursuant to Headquarter's reconsideration of New York Ruling Letter (NY) 886597, dated June 15, 1993, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of Coromandel screens from China or Hong Kong.

This letter is to inform you that after review of that ruling, it has been determined that the classification of the subject screens, in subheading 4421.90.4000, HTSUSA, is incorrect. As such, NY 886597 is revoked pursuant to the analysis which follows below.

Facts:

In your original ruling request, the subject items were described as floor-standing screens, consisting of hinged panels measuring either 72 inches high or 84 inches high (depending on the screen) with the panels present in sets of either four or six. You further stated that the panels are made of wood and are lacquered and painted on both sides. You claimed that the panels are used to decoratively divide a room or to conceal an area.

Issue:

What is the proper classification of the Coromandel screens under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, provided the headings or

notes do not otherwise require, according to the remaining GRIs taken in order. The provisions under consideration are as follows:

4421.90.4000	Other articles of wood; Other; Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware: Other.
9403.60.8080	Other furniture and parts thereof: Other wooden furniture: Other, Other.

Subheading 4421.90.4000, HTSUSA, is under consideration because it specifically provides for, *inter alia*, wood screens. Subheading 9403.60.8080, HTSUSA, is under consideration because the subject screen is an item normally considered to be "furniture." We note the following dictionary definitions:

> furniture (1)—* * * the movable articles, as tables, chairs, bedsteads, desks, cabinets, etc., required for use or ornament in a house, office, or the like. *The Random House Dictionary of the English Language*, the Unabridged Edition;
>
> furniture (2)—* * * (The prevailing sense.) Movable articles, whether useful or ornamental, in a dwelling-house, place of business, or public building. Formerly including also the fittings. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

We find that the subject screens fit these definitions of "furniture." They are movable and are constructed for placing on the floor. Their primary purpose is utilitarian, to partition a room or screen off a corner. Such screens are also used to display photographs and are used in both private dwellings and offices. We note that the above definitions are very similar to the more detailed definition of furniture provided at General Explanatory Note (A) to Chapter 94, which states as follows:

> For the purposes of this Chapter, the term "furniture" means:
>
> (B) Any "movable" articles (**not included** under other more specific headings of the Nomenclature), which would have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes, restaurants, laboratories, hospitals dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be "movable" furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

In fact, certain types of screens, *i.e.*, "fire screens" and "draught screens" are even listed as exemplars of furniture in the Explanatory Notes to Heading 9403, HTSUSA. Additionally, it is relevant that screens themselves are usually defined as furniture, as seen in the following:

> Screens—* * * a piece of furniture consisting usually of an upright board or frame hung with leather, canvas, cloth, tapestry, or paper, or of two or more such boards or frames hinged together. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

Finally, we note that Customs has regularly classified screens of material other than wood as furniture in heading 9403, HTSUSA. *See* NY D88618, dated March 4, 1999, in which a single panel room screen, with a black iron frame, was classified in subheading 9403.20.0010, HTSUSA, the provision for metal furniture. *See also*, NY E86030, dated September 20, 1999, in which several multi-panel screens (non-wood) are classified as furniture, in various subheadings of 9403 depending on the materials of which they are constructed. The courts have also recognized that screens are types of furniture. *See Sanji Kobata v. United States*, 66 Cust. Ct. 341, C.D. 4213 (1971), in which the court stated that it considers screens to be articles of furniture.

Given the fact that screens, such as those at issue here, do constitute furniture, the decision must be made as to which of the two provisions of the HTSUSA, cited above, is the more appropriate provision of classification.

Pursuant to GRI 3(a), if a product is classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. This rule would seem to indicate classification under heading 4421 (Chapter 44) and the apparently more specific description provided in subheading

4421.90.4000, HTSUSA (wood screens). However, Explanatory Note II to GRI 3 states that:

> * * * the Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require.** For instance, Note 4(b) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.06 shall be classified in one of the former headings. Such goods are to be classified according to Note 4(b) to Chapter 97 and not according to this Rule.

(Emphasis from original.) In this instance, we must consider Note 1(o) to Chapter 44, which states as follows:

> 1. This Chapter does not cover:
>
> (o) Articles of Chapter 94 (for example, furniture, lamps and lighting fittings, prefabricated buildings);

Therefore, Note 1(o) to Chapter 44 precludes consideration of that chapter for purposes of the classification of the subject screens because it excludes from classification in Chapter 44 all articles of Chapter 94, which would include furniture. Classification in subheading 4421.90.4000, HTSUSA, cannot even be considered; only after determining that a product is classifiable under the heading should the subheadings be examined to find the correct classification of the merchandise. *See* GRI 1,6. *See also*, *American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922 (CIT 1998). Accordingly, the subject wooden folding screens should be classified in heading 9403, HTSUSA, as other furniture and parts thereof.

Holding:

The subject screens are classifiable in subheading 9403.60.8080, HTSUSA, which provides for Other furniture and parts thereof: Other wooden furniture: Other, Other. The duty rate is 1 percent ad valorem.

NY 886597 is hereby revoked. In accordance with 19 U.S.C., Section 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT N]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964913 STB
Category: Classification
Tariff No. 9403.60.8080

MR. KARL F. KRUEGER
AEI-CARR CUSTOM BROKERAGE SERVICES
1600 West Lafayette
Detroit, MI 48216

Re: Revocation of NY C82177; Classification of a Wood Floor Screen with Picture Frames from China or Thailand as Other Furniture and Parts Thereof, Heading 9403, HTSUSA; Not as Other Articles of Wood: Not Heading 4421, HTSUSA.

DEAR MR. KRUEGER:

This letter is pursuant to Headquarter's reconsideration of New York Ruling Letter (NY) C82177, issued to you on behalf of your client, Umbra U.S.A., Inc., dated December 16, 1997, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a wood floor screen with picture frames from China or Thailand.

This letter is to inform you that after review of that ruling, it has been determined that the classification of the wood screens, in subheading 4421.90.4000, HTSUSA, is incorrect. As such, NY C82177 is revoked pursuant to the analysis which follows below.

Facts:

In NY C82177, a ruling was requested on a product named the "Sona Floor Screen Frame." Descriptive literature in a catalogue and an advertising flyer was submitted with the ruling request. The floor screen was described therein as a three-panel floor standing wood screen measuring 35 inches wide by 69 inches high. Each panel was said to have five 8 by 10 size picture frames (organized in a straight row) from the top to the bottom. You claimed that the picture frames are a unique and prominent feature of the screen.

Issue:

What is the proper classification of the subject screen under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, provided the headings or notes do not otherwise require, according to the remaining GRIs taken in order. The provisions under consideration are as follows:

4421.90.4000	Other articles of wood; Other; Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware: Other.
9403.60.8080	Other furniture and parts thereof: Other wooden furniture: Other, Other.

Subheading 4421.90.4000, HTSUSA, is under consideration because it specifically provides for, *inter alia*, wood screens. Subheading 9403.60.8080, HTSUSA, is under consideration because the subject screen is an item normally considered to be "furniture." We note the following dictionary definitions:

> furniture (1)—* * * the movable articles, as tables, chairs, bedsteads, desks, cabinets, etc., required for use or ornament in a house, office, or the like. *The Random House Dictionary of the English Language*, the Unabridged Edition;
>
> furniture (2)—* * * (The prevailing sense.) Movable articles, whether useful or ornamental, in a dwelling-house, place of business, or public building. Formerly including also the fittings. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

We find that the subject screen fits these definitions of "furniture." It is movable and is constructed for placing on the floor. Its primary purpose is utilitarian, to partition a room or screen off a corner. Such screens are also used to display photographs and are used in both private dwellings and offices. We note that the above definitions are very similar to the more detailed definition of furniture provided at General Explanatory Note (A) to Chapter 94, which states as follows:

> For the purposes of this Chapter, the term "furniture" means:
>
> (B) Any "movable" articles (**not included** under other more specific headings of the Nomenclature), which would have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes, restaurants, laboratories, hospitals dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be "movable" furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

In fact, certain types of screens, *i.e.*, "fire screens" and "draught screens" are even listed as exemplars of furniture in the Explanatory Notes to Heading 9403, HTSUSA. Additionally, it is relevant that screens themselves are usually defined as furniture, as seen in the following:

> Screens—* * * a piece of furniture consisting usually of an upright board or frame hung with leather, canvas, cloth, tapestry, or paper, or of two or more such boards or

frames hinged together. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

Finally, we note that Customs has regularly classified screens of material other than wood as furniture in heading 9403, HTSUSA. *See* NY D88618, dated March 4, 1999, in which a single panel room screen, with a black iron frame, was classified in subheading 9403.20.0010, HTSUSA, the provision for metal furniture. *See also*, NY E86030, dated September 20, 1999, in which several multi-panel screens (non-wood) are classified as furniture, in various subheadings of 9403 depending on the materials of which they are constructed. The courts have also recognized that screens are types of furniture. *See Sanji Kobata v. United States*, 66 Cust. Ct. 341, C.D. 4213 (1971), in which the court stated that it considers screens to be articles of furniture.

Given the fact that screens, such as the one at issue here, do constitute furniture, the decision must be made as to which of the two provisions of the HTSUSA, cited above, is the more appropriate provision of classification.

Pursuant to GRI 3(a), if a product is classifiable under two or more headings, the heading which provides the most specific description shall be referred to headings providing a more general description. This rule would seem to indicate classification under heading 4421 (Chapter 44) and the apparently more specific description provided in subheading 4421.90.4000, HTSUSA (wood screens). However, Explanatory Note II to GRI 3 states that:

> * * * the Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require.** For instance, Note 4(b) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.06 shall be classified in one of the former headings. Such goods are to be classified according to Note 4(b) to Chapter 97 and not according to this Rule.

(Emphasis from original.) In this instance, we must consider Note 1(o) to Chapter 44, which states as follows:

> 1. This Chapter does not cover:
>
> (o) Articles of Chapter 94 (for example, furniture, lamps and lighting fittings, prefabricated buildings);

Therefore, Note 1(o) to Chapter 44 precludes consideration of that chapter for purposes of the classification of the subject screen because it excludes from classification in Chapter 44 all articles of Chapter 94, which would include furniture. Classification in subheading 4421.90.4000, HTSUSA, cannot even be considered; only after determining that a product is classifiable under the heading should the subheadings be examined to find the correct classification of the merchandise. *See* GRI 1,6. *See also*, *American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922 (CIT 1998). Accordingly, the subject screen should be classified in heading 9403, HTSUSA, as other furniture and parts thereof.

Holding:

The subject screen is classifiable in subheading 9403.60.8080, HTSUSA, which provides for Other furniture and parts thereof: Other wooden furniture: Other, Other. The duty rate is 1 percent ad valorem.

NY C82177, classifying the subject screen in heading 4421, HTSUSA, is hereby revoked. In accordance with 19 U.S.C., Section 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT O]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964914 STB
Category: Classification
Tariff No. 9403.60.8080

MS. SHELLY PAPPAS
VALUE CITY IMPORTS
1800 Moler Road
Columbus, OH 43207

Re: Revocation of NY C85674; Classification of a Wooden Floor Screen from Taiwan as Other Furniture and Parts Thereof, Heading 9403, HTSUSA; Not as Other Articles of Wood: Not Heading 4421, HTSUSA.

DEAR MS. PAPPAS:

This letter is pursuant to Headquarter's reconsideration of New York Ruling Letter (NY) C85674, issued to you on April 16, 1998, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a wooden floor screen from Taiwan.

This letter is to inform you that after review of that ruling, it has been determined that the classification of the wooden screen, in subheading 4421.90.4000, HTSUSA, is incorrect. As such, NY C85674 is revoked pursuant to the analysis which follows below.

Facts:

In your original letter requesting a tariff classification ruling, dated March 13, 1998, you submitted a sample identified as a "photo gallery floor screen." The item was described in NY C85674 as a decorative, floor-standing article consisting of three upright wooden panels (each with two stubby legs) attached to each other with hinges. Each panel is approximately 11½ inches wide by 69 inches high, and consists of a wood framework surrounding a vertical array of five identical rectangular openings intended to accommodate photographs (up to 8″ x 10″) for display. It is further related in NY C85674 that each of the rectangular openings is, in turn, equipped with a pane of glass, paper mat and removable fiberboard back.

Issue:

What is the proper classification of the subject screen under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, provided the headings or notes do not otherwise require, according to the remaining GRIs taken in order. The provisions under consideration are as follows:

4421.90.4000	Other articles of wood; Other; Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware: Other.
9403.60.8080	Other furniture and parts thereof: Other wooden furniture: Other, Other.

Subheading 4421.90.4000, HTSUSA, is under consideration because it specifically provides for, *inter alia*, wood screens. Subheading 9403.60.8080, HTSUSA, is under consideration because the subject screen is an item normally considered to be "furniture." We note the following dictionary definitions:

> furniture (1)—* * * the movable articles, as tables, chairs, bedsteads, desks, cabinets, etc., required for use or ornament in a house, office, or the like. *The Random House Dictionary of the English Language*, the Unabridged Edition;
>
> furniture (2)—* * * (The prevailing sense.) Movable articles, whether useful or ornamental, in a dwelling-house, place of business, or public building. Formerly including also the fittings. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

We find that the subject screen fits these definitions of "furniture." It is movable and is constructed for placing on the floor. Its primary purpose is utilitarian, to partition a room or screen off a corner. Such screens are also used to display photographs and are used in both private dwellings and offices. We note that the above definitions are very similar to the more detailed definition of furniture provided at General Explanatory Note (A) to Chapter 94, which states as follows:

> For the purposes of this Chapter, the term "furniture" means:
>
> (B) Any "movable" articles (**not included** under other more specific headings of the Nomenclature), which would have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes, restaurants, laboratories, hospitals dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be "movable" furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

In fact, certain types of screens, *i.e.*, "fire screens" and "draught screens" are even listed as exemplars of furniture in the Explanatory Notes to Heading 9403, HTSUSA. Additionally, it is relevant that screens themselves are usually defined as furniture, as seen in the following:

> Screens—* * * a piece of furniture consisting usually of an upright board or frame hung with leather, canvas, cloth, tapestry, or paper, or of two or more such boards or frames hinged together. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

Finally, we note that Customs has regularly classified screens of material other than wood as furniture in heading 9403, HTSUSA. *See* NY D88618, dated March 4, 1999, in which a single panel room screen, with a black iron frame, was classified in subheading 9403.20.0010, HTSUSA, the provision for metal furniture. *See also*, NY E86030, dated September 20, 1999, in which several multi-panel screens (non-wood) are classified as furniture, in various subheadings of 9403 depending on the materials of which they are constructed. The courts have also recognized that screens are types of furniture. *See Sanji Kobata v. United States*, 66 Cust. Ct. 341, C.D. 4213 (1971), in which the court stated that it considers screens to be articles of furniture.

Given the fact that screens, such as the one at issue here, do constitute furniture, the decision must be made as to which of the two provisions of the HTSUSA, cited above, is the more appropriate provision of classification.

Pursuant to GRI 3(a), if a product is classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. This rule would seem to indicate classification under heading 4421 (Chapter 44) and the apparently more specific description provided in subheading 4421.90.4000, HTSUSA (wood screens). However, Explanatory Note II to GRI 3 states that:

> * * * the Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require.** For instance, Note 4(b) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.06 shall be classified in one of the former headings. Such goods are to be classified according to Note 4(b) to Chapter 97 and not according to this Rule.

(Emphasis from original.) In this instance, we must consider Note 1(o) to Chapter 44, which states as follows:

> 1. This Chapter does not cover:
>
> (o) Articles of Chapter 94 (for example, furniture, lamps and lighting fittings, prefabricated buildings);

Therefore, Note 1(o) to Chapter 44 precludes consideration of that chapter for purposes of the classification of the subject screen because it excludes from classification in Chapter 44 all articles of Chapter 94, which would include furniture. Classification in subheading 4421.90.4000, HTSUSA, cannot even be considered; only after determining that a product is classifiable under the heading should the subheadings be examined to find the correct

classification of the merchandise. *See* GRI 1,6. *See also*, *American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922 (CIT 1998). Accordingly, the subject screen should be classified in heading 9403, HTSUSA, as other furniture and parts thereof.

Holding:

The subject screen is classifiable in subheading 9403.60.8080 , HTSUSA, which provides for Other furniture and parts thereof: Other wooden furniture: Other, Other. The duty rate is 1 percent ad valorem.

NY C85674, classifying the subject screen in heading 4421, HTSUSA, is hereby revoked. In accordance with 19 U.S.C., Section 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT P]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964915 STB
Category: Classification
Tariff No. 9403.60.8080

MR. ORLANDO RODRIGUEZ
ALMACENES PITUSA
P.O. 839
Hato Rey Station
San Juan, PR 00919–0839

Re: Revocation of NY F80426; Classification of Wood Folding Screens with Photo Frames from Thailand as Other Furniture and Parts Thereof, Heading 9403, HTSUSA; Not as Other Articles of Wood: Not Heading 4421, HTSUSA.

DEAR MR. RODRIGUEZ:

This letter is pursuant to Headquarter's reconsideration of New York Ruling Letter (NY) F80426, dated December 28, 1999, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of wood folding screens with photo frames from Thailand.

This letter is to inform you that after review of that ruling, it has been determined that the classification of the subject screens, in subheading 4421.90.4000, HTSUSA, is incorrect. As such, NY F80426 is revoked pursuant to the analysis which follows below.

Facts:

The New York tariff classification ruling was requested with regard to three different photo frame screens all of which are made of solid rubberwood. Product information sheets with photocopied pictures were submitted with your request.

One item, No. B–35–C3035, is described in NY F80426 as a single photo frame panel with a wood stick easel. The panel measures 8 inches wide by 34 inches high and is designed to hold six photographs vertically in a row. Another item, No. B–35–C3038, is a two-panel hinged folding screen with feet. Each panel measures 8 inches wide by 56 inches high and is designed to hold six photographs. The third item, No. B–35–C3003, is a three-panel hinged folding screen with feet. Each panel measures 7 inches wide by 43 inches high and is designed to hold five photographs.

The first item described above, No. B–35–C3035 (the single photo frame panel) was not classified in NY F80426 due to a lack of sufficient information. The classification of that item is not affected by this revocation. The other two items, Nos. B–35–C3038 and B–35–C3003, were classified in subheading 4421.90.4000, HTSUSA.

Issue:

What is the proper classification of the two multi-panel screens under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, provided the headings or notes do not otherwise require, according to the remaining GRIs taken in order. The provisions under consideration are as follows:

4421.90.4000	Other articles of wood; Other; Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware: Other.
9403.60.8080	Other furniture and parts thereof: Other wooden furniture: Other, Other.

Subheading 4421.90.4000, HTSUSA, is under consideration because it specifically provides for, *inter alia*, wood screens. Subheading 9403.60.8080, HTSUSA, is under consideration because the subject screen is an item normally considered to be "furniture." We note the following dictionary definitions:

> furniture (1)—* * * the movable articles, as tables, chairs, bedsteads, desks, cabinets, etc., required for use or ornament in a house, office, or the like. *The Random House Dictionary of the English Language*, the Unabridged Edition;
>
> furniture (2)—* * * (The prevailing sense.) Movable articles, whether useful or ornamental, in a dwelling-house, place of business, or public building. Formerly including also the fittings. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

We find that the subject screens fit these definitions of "furniture." They are movable and are constructed for placing on the floor. Their primary purpose is utilitarian, to partition a room or screen off a corner. Such screens are also used to display photographs and are used in both private dwellings and offices. We note that the above definitions are very similar to the more detailed definition of furniture provided at General Explanatory Note (A) to Chapter 94, which states as follows:

> For the purposes of this Chapter, the term "furniture" means:
>
> (B) Any "movable" articles (**not included** under other more specific headings of the Nomenclature), which would have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes, restaurants, laboratories, hospitals dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be "movable" furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

In fact, certain types of screens, *i.e.*, "fire screens" and "draught screens" are even listed as exemplars of furniture in the Explanatory Notes to Heading 9403, HTSUSA. Additionally, it is relevant that screens themselves are usually defined as furniture, as seen in the following:

> Screens—* * * a piece of furniture consisting usually of an upright board or frame hung with leather, canvas, cloth, tapestry, or paper, or of two or more such boards or frames hinged together. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

Finally, we note that Customs has regularly classified screens of material other than wood as furniture in heading 9403, HTSUSA. *See* NY D88618, dated March 4, 1999, in which a single panel room screen, with a black iron frame, was classified in subheading 9403.20.0010, HTSUSA, the provision for metal furniture. *See also*, NY E86030, dated September 20, 1999, in which several multi-panel screens (non-wood) are classified as furniture, in various subheadings of 9403 depending on the materials of which they are constructed. The courts have also recognized that screens are types of furniture. *See Sanji Kobata v. United States*, 66 Cust. Ct. 341, C.D. 4213 (1971), in which the court stated that it considers screens to be articles of furniture.

Given the fact that screens, such as those at issue here, do constitute furniture, the decision must be made as to which of the two provisions of the HTSUSA, cited above, is the more appropriate provision of classification.

Pursuant to GRI 3(a), if a product is classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. This rule would seem to indicate classification under heading 4421 (Chapter 44) and the apparently more specific description provided in subheading 4421.90.4000, HTSUSA (wood screens). However, Explanatory Note II to GRI 3 states that:

> * * * the Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require.** For instance, Note 4(b) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.06 shall be classified in one of the former headings. Such goods are to be classified according to Note 4(b) to Chapter 97 and not according to this Rule.

(Emphasis from original.) In this instance, we must consider Note 1(o) to Chapter 44, which states as follows:

> 1. This Chapter does not cover:
>
> (o) Articles of Chapter 94 (for example, furniture, lamps and lighting fittings, prefabricated buildings);

Therefore, Note 1(o) to Chapter 44 precludes consideration of that chapter for purposes of the classification of the subject screens because it excludes from classification in Chapter 44 all articles of Chapter 94, which would include furniture. Classification in subheading 4421.90.4000, HTSUSA, cannot even be considered; only after determining that a product is classifiable under the heading should the subheadings be examined to find the correct classification of the merchandise. *See* GRI 1,6. *See also, American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922 (CIT 1998). Accordingly, the subject wooden folding screens should be classified in heading 9403, HTSUSA, as other furniture and parts thereof.

Holding:

The subject screens are classifiable in subheading 9403.60.8080, HTSUSA, which provides for Other furniture and parts thereof: Other wooden furniture: Other, Other. The duty rate is 1 percent ad valorem.

NY F80426 is hereby revoked. In accordance with 19 U.S.C., Section 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT Q]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:TE 964916 STB
Category: Classification
Tariff No. 9403.60.8080

MS. BONNIE GULYAS
IMPORT CUSTOMS ANALYST,
HOME & LEISURE DIVISION
J.C. PENNY PURCHASING CORPORATION
P.O. Box 10001
Dallas, TX 75301-0001

Re: Modification of NY E86030 and NY E86014; Classification of Screens (Decorative Room Dividers) from Taiwan and China as Other Furniture and Parts Thereof, Heading 9403, HTSUSA; Not as Other Articles of Wood: Not Heading 4421, HTSUSA

DEAR MS. GULYAS:

This letter is pursuant to Headquarter's reconsideration of New York Ruling Letter (NY) E86030 and NY E86014, both dated September 20, 1999, concerning the classifica-

tion under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of screens/decorative room dividers from Taiwan and China.

Some of the screens classified in NY E86030 and NY E86014 are constructed primarily of wood. Others are described as being constructed of plastic and other materials. This letter is to inform you that after review of those rulings, it has been determined that the classification of the wooden screens provided therein (in subheading 4421.90.4000, HTSUSA) is incorrect. As such, NY E86030 and NY E86014, as they concern the screens constructed of wood, are modified pursuant to the analysis which follows below. The classifications provided by the above rulings with respect to the screens constructed of materials other than wood are not affected by the present ruling.

Facts:

NY E86030 discusses your ruling request dated August 16, 1999, which was made with respect to five items. All of the items involved are folding, three-panel decorative screens, although you mentioned in your request that some of the models may also be offered in larger versions with four to six panels.

Lot No. 778–6003 was said to consist of continuous plywood panels, handpainted with a seaside picture, fastened together with metal hinges. The screen is said to measure 48.75 inches in width and 69 inches in height. Lot No. 9460577 is described in NY E86030 as featuring a pine center panel which resembles a door. The adjacent panels, attached with metal hinges, are described ad exhibiting a pine framework which has numerous rectangular openings filled in with decorative ironwork. The dimensions are said to measure 71.25 inches in width and 70 inches in height.

The two lots described above were classified, in NY E86030, in subheading 4421.90.4000, HTSUSA. These screens were determined to be constructed primarily of wood.

The other items described in NY E86030 were screens considered to be constructed primarily of plastic and iron. These items were classified in that ruling in heading 9403 (furniture) in various subheadings depending on the material of which they were constructed.

NY E86014 discusses your ruling request with respect to four different items—this request was also dated August 16,1999. All of the items involved in this ruling request are also folding, three-panel decorative screens, with some models possibly being offered in larger versions of four to six panels. It is mentioned in NY E86014 that the panels are held together with metal hinges.

Lot No. 778–2295 is described as consisting of "ramin wood panels," each of which has four rectangular openings in which pictures may be displayed. The dimensions are provided as 35.25 inches in width and 60.25 inches in height. Lot No. 946–0908 is described as having "solid pine wood panels." The dimensions are said to be 59 inches in width and 65 inches in height.

The two lots described above were classified, in NY E86014, in subheading 4421.90.4000, HTSUSA. As with the screens similarly classified in NY E86030, the screens of these lots were determined to be constructed primarily of wood.

The other items described in NY E86014 were screens considered to be constructed primarily of polyester/cotton fabric and canvas. These items were classified in that ruling in heading 9403 (furniture) in various subheadings depending on the material of which they were constructed.

Issue:

What is the proper classification of the screens constructed primarily of wood under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, provided the headings or

notes do not otherwise require, according to the remaining GRIs taken in order. The provisions under consideration are as follows:

4421.90.4000	Other articles of wood; Other; Wood blinds, shutters, screens and shades, all the foregoing with or without their hardware: Other.
9403.60.8080	Other furniture and parts thereof: Other wooden furniture: Other, Other.

Subheading 4421.90.4000, HTSUSA, is under consideration because it specifically provides for, *inter alia*, wood screens. Subheading 9403.60.8080, HTSUSA, is under consideration because the subject screen is an item normally considered to be "furniture." We note the following dictionary definitions:

> furniture (1)—* * * the movable articles, as tables, chairs, bedsteads, desks, cabinets, etc., required for use or ornament in a house, office, or the like. *The Random House Dictionary of the English Language*, the Unabridged Edition;
>
> furniture (2)—* * * (The prevailing sense.) Movable articles, whether useful or ornamental, in a dwelling-house, place of business, or public building. Formerly including also the fittings. *The Oxford English Dictionary* (Compact Disc), Oxford University Press, 1999.

We find that the subject screens fit these definitions of "furniture." They are movable and are constructed for placing on the floor. Their primary purpose is utilitarian, to partition a room or screen off a corner. Such screens are also used to display photographs (some of the subject screens are specifically designed for this purpose) and are used in both private dwellings and offices. We note that the above definitions are very similar to the more detailed definition of furniture provided at General Explanatory Note (A) to Chapter 94, which states as follows:

> For the purposes of this Chapter, the term "furniture" means:
>
> (B) Any "movable" articles (**not included** under other more specific headings of the Nomenclature), which would have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes, restaurants, laboratories, hospitals dentists' surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport. (It should be noted that, for the purposes of this Chapter, articles are considered to be "movable" furniture even if they are designed for bolting, etc., to the floor, e.g., chairs for use on ships). Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category.

In fact, certain types of screens, *i.e.*, "fire screens" and "draught screens" are even listed as exemplars of furniture in the Explanatory Notes to Heading 9403, HTSUSA.

Additionally, it is relevant that screens themselves are usually defined as furniture, as seen in the following:

> Screens—* * * a piece of furniture consisting usually of an upright board or frame hung with leather, canvas, cloth, tapestry, or paper, or of two or more such boards or frames hinged together. *The Oxford Enulish Dictionary* (Compact Disc), Oxford University Press, 1999.

Finally, we note that Customs has regularly classified screens of material other than wood as furniture in heading 9403, HTSUSA. *See* NY D88618, dated March 4,1999, in which a single panel room screen, with a black iron frame, was classified in subheading 9403.20.0010, HTSUSA, the provision for metal furniture. *See also*, NY E86030, dated September 20, 1999, in which several multi-panel screens (non-wood) are classified as furniture, in various subheadings of 9403 depending on the materials of which they are constructed. The courts have also recognized that screens are types of furniture. *See Sanii Kobata v. United States*, 66 Cust. Ct. 341, C.D. 4213 (1971), in which the court stated that it considers screens to be articles of furniture.

Given the fact that screens, such as those at issue here, do constitute furniture, the decision must be made as to which of the two provisions of the HTSUSA, cited above, is the more appropriate provision of classification.

Pursuant to GRI 3(a), if a product is classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. This rule would seem to indicate classification under heading 4421 (Chapter 44) and the apparently more specific description provided in subheading

4421.90.4000, HTSUSA (wood screens). However, Explanatory Note II to GRI 3 states that:

> * * * the Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require.** For instance, Note 4(b) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.06 shall be classified in one of {he former headings. Such goods are to be classified according to Note4(b) to Chapter 97 and not according to this Rule.

(Emphasis from original.) In this instance, we must consider Note 1(o) to Chapter 44, which states as follows:

> 1. This Chapter does not cover:
>
> (o) Articles of Chapter 94 (for example, furniture, lamps and lighting fittings, prefabricated buildings);

Therefore, Note 1 (o) to Chapter 44 precludes consideration of that chapter for purposes of the classification of the subject screens because it excludes from classification in Chapter 44 all articles of Chapter 94, which would include furniture. Classification in subheading 4421.90.4000, HTSUSA, cannot even be considered; only after determining that a product is classifiable under the heading should the subheadings be examined to find the correct classification of the merchandise. *See* GRI 1,6. *See aiso, American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922 (CIT 1998). Accordingly, the subject screens should be classified in heading 9403, HTSUSA, as other furniture and parts thereof.

Holding:

The screens determined to be constructed primarily of wood (Lot Nos. 778–8003 and 946–0577 in NY E86030 and Lot Nos. 778–2295 and 946–0908 n NY E86014) are classifiable in subheading 9403.60.8080, HTSUSA, which provides for Other furniture and parts thereof: Other wooden furniture: Other, Other. The duty rate is 1 percent ad valorem.

NY E86030 and NY E86014, classifying the subject wooden screens in heading 4421, HTSUSA, are hereby modified as described above. The classifications provided in those rulings with respect to the screens constructed of materials other than wood are not affected by this ruling. In accordance with 19 U.S.C., Section 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF MEMORY CARDS FOR VIDEO GAME MACHINES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of a ruling letter, and revocation of treatment relating to tariff classification of memory cards for video game machines.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of memory cards used for video game machines under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before September 13, 2002.

ADDRESS: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, NW, Washington, D.C during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Tom Peter Beris, General Classification Branch, (202) 572–8789.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both

the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to modify New York Ruling Letter (NY) 813932 pertaining to the tariff classification of certain memory cards used with video game machines. Although in this notice Customs is specifically referring to one ruling, NY 813932, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY 813932 dated August 23, 1995, set forth as Attachment A to this document, among other articles, Customs classified memory cards used with the Sony Playstation in subheading 9504.10.0030, HTSUS, which provides for "Articles for arcade, table or parlor games * * *; parts and accessories thereof: Video games of a kind used with a television receiver * * *, Parts and accessories thereof."

It is now Customs position that the memory cards in this ruling are properly classifiable under subheading 8523.90.00, HTSUS which provides for "Prepared unrecorded media for sound recording or similar recording of other phenomena, other than products of chapter 37: Other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify NY 813932, and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analy-

sis set forth in proposed HQ 965759 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: July 24, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, August 23, 1995.

CLA–2–95:S:N:N7:224 813932
Category: Classification
Tariff No. 9504.10.0010,
9504.10.0030, and 8543.80.9890

LUCY RICHARDSON
SONY ELECTRONICS INC.
1 Sony Drive
Park Ridge, NJ 07656–8003

Re: The tariff classification of video game machine from Japan.

DEAR MS. RICHARDSON:

In your letter dated August 17, 1995, you requested a tariff classification ruling.

The merchandise is a video game machine known as the Sony PlayStation (PS-X). It consists of the main unit which has a 32-bit processor and CD-Rom architecture; a joypad controller with four top buttons; an AC power cable and stereo AV cable.

The PlayStation PS-X is not being targeted at the multimedia sector; it is said to be primarily designed, marketed and used to play video games on a television screen. It can also play an audio (music) CD. While other video game machines utilize ROM cartridges, the PlayStation operates solely on CD-ROM.

The applicable subheading for the PlayStation PS-X video game machine will be 9504.10.0010, Harmonized Tariff Schedule of the United States (HTS), which provides for "Articles for arcade, table or parlor games * * *; parts and accessories thereof: Video games of a kind used with a television receiver and parts and accessories thereof, games." The rate of duty will be free.

You also inquire as to the tariff classification of five accessories to the PlayStation unit when imported separately. These items include:

1. A memory card that plugs into the front of the PlayStation and allows game data to be saved;
2. Additional joypad controller;
3. A cable which can connect two PlayStations together to play against one another if two TV monitors are present;
4. A mouse with a pad which is recommended for use with certain games;
5. An RFU adapter which attaches to back of a TV set and compensates for the lack of a video input.

With the exception of the RFU adapter, these accessories are said to be designed specifically for use with the PlayStation and cannot be used elsewhere. Accordingly, the applica-

ble subheading for the memory card, controller, link combat cable and the mouse will be 9504.10.0030, HTS, which provides for "Articles for arcade, table or parlor games * * *; parts and accessories thereof: Video games of a kind used with a television receiver * * *; Parts and accessories thereof." The rate of duty will be free.

The RFU adapter is classifiable in subheading 8543.80.9890, HTS, which provides for electric machines and apparatus, having individual functions * * *: other machines and apparatus: other, other. The rate of duty will be 3.6 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR: CR: GC 965759 TPB
Category: Classification
Tariff No. 8523.90.00

LUCY RICHARDSON
TRADE STRATEGY AND COMPLIANCE
SONY ELECTRONICS, INC.
123 Tice Blvd.
Woodcliff Lake, NJ 07675

Re: Sony PlayStation Memory Card.

DEAR MS. RICHARDSON:

This is in reference to NY 813932, issued to you on August 23, 1995, in response to your letter dated August 17, 1995, requesting classification, among other articles, of a memory card for the Sony PlayStation ("PX-X"), if separately imported, under the Harmonized Tariff Schedule of the United States ("HTSUS"). We have had an opportunity to review that ruling and now find it to no longer reflects our view as to the classification of unrecorded media. This ruling modifies NY 813932 to the extent noted.

Facts:

The merchandise in question is a "flash" memory card that plugs into the front of the PS-X and allows game data to be saved. The memory card is designed for and used exclusively for the PS-X. The card comes unrecorded, or "blank."

Issue:

Is the PS-X memory card properly classified under heading 8523, as unrecorded media, or heading 9504, as an accessory to a video game of a kind used with a television receiver?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the interna-

tional level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

The HTSUS provisions under consideration are as follows:

8523	Prepared unrecorded media for sound recording or similar recording of other phenomena, other than products of chapter 37:
9504	Articles for arcade, table or parlor games, including pinball machines, bagatelle, billiards and special tables for casino games, automatic bowling alley equipment, parts and accessories thereof:

NY 813932 ruled that because the memory cards were designed specifically for use with the PS-X and could not be used elsewhere, they were classifiable under subheading 9504.10.0030, HTSUS, as accessories of video games of a kind used with a television receiver.

Headquarters has recently issued a series of rulings dealing with unrecorded flash memory. See HQ 964875, dated March 27, 2002 (classifying flash memory cards under heading 8523); HQ 962507, dated May 22, 2002 (classifying flash memory sticks in heading 8543); HQ 965529, dated June 25, 2002 (classifying a flash memory card for an MP3 device in heading 8523). For the reasons set forth in those rulings, which we incorporate by reference, we find that the unrecorded flash memory cards for use with the PS-X are properly classified under subheading 8523.90.00, HTSUS, which provides for "prepared unrecorded media for sound recording or similar recording of other phenomena, other than products of chapter 37: other."

Holding:

For the reasons stated above, the memory card is to be classified under subheading 8523.90.00, HTSUS, as: prepared unrecorded media for sound recording or similar recording of other phenomena, other than products of chapter 37: other."

Effect on other Rulings:

NY 813932 is modified to the extent described above, i.e., the memory card, when imported separately, is classifiable in heading 8523, HTSUS. All other classification determinations in NY 813932 remain unaffected.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF THE CONTAINER COMPONENTS OF EMERGENCY ROADSIDE AUTOMOBILE KITS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of a ruling letter and revocation of treatment relating to the tariff classification of the container components of emergency roadside automobile kits.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter related to the classification of the container components of emergency roadside automobile kits under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, Customs is revoking any treatment previously accorded by it to substantially identical merchandise that is contrary to the position set forth in this notice. Notice of the proposed action was published on June 5, 2002 in the CUSTOMS BULLETIN in Volume 36, Number 23. One comment was received in response to this notice.

EFFECTIVE DATE: This action is effective for merchandise entered or with-drawn from warehouse for consumption on or after October 14, 2002.

FOR FURTHER INFORMATION CONTACT: Teresa Frazier, Textile Branch (202) 572–8821.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility".** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise,

and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In NY D88516, dated March 31, 1999, Customs classified an *Ultimate Auto Safety Kit* emergency automobile roadside kit's nylon bag component pursuant to GRI 5(a), which resulted in the merchandise being classified with the contents and the value being prorated over the contents. For classification purposes, the items included in the kit were not considered to comprise a set. Customs has reviewed the ruling and, with regard to the classification of this bag, has determined that the ruling is in error. Since the issuance of this ruling, Customs has reviewed the classification of the kit and has determined that the cited ruling is in error. Accordingly, we are modifying NY D88516 to reflect proper classification of the container component within subheading 4202.92.9026, HTSUSA, pursuant to GRI 1 as set for in the analysis of HQ 963598 (see "Attachment" to this document).

Pursuant to Customs obligations, a notice of proposed modification of New York Ruling Letter (NY) D88516, dated March 31, 1999, was published in the CUSTOMS BULLETIN of June 5, 2002, Volume 36, Number 23. One comment from the importer (which was timely received in response to this notice) was considered. In this comment, the importer requested a delayed effective date of this modification. We have considered the importer's request. However, we have no authority to extend the effective date beyond the sixty-day statutory time frame provided by 19 U.S.C. 1625(c).

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, Customs is modifying a ruling letter relating to the classification of a nylon bag container component of an emergency roadside automobile kit. Although in this notice Customs is specifically referring to New York Ruling Letter (NY) D88516, dated March 31, 1999, this notice covers any rulings on such merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the issues subject to this notice, should have advised Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's failure to ad-

vise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

Dated: July 30, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 30, 2002.

CLA–2 RR:TC:TE 963598 TMF
Category: Classification
Tariff No. 4202.92.9026

MR. JIM WICKSTEAD, SENIOR CONSULTANT
PBB GLOBAL LOGISTICS
434 Delaware Avenue
Buffalo, NY 14202

Re: Modification of NY D88516; *Ultimate Auto Safety Kit*; emergency roadside automobile kits.

DEAR MR. WICKSTEAD:

In New York Ruling Letter (NY) D88516, dated March 31, 1999, issued to you on behalf of your client, Micris One, Inc., you were advised that the nylon bag which contained the items of the *Ultimate Auto Safety Kit*, was classified with its contents as a container described in GRI 5(a), and its value prorated over the contents. We have reviewed NY D88516 and have found it to be in error. Therefore, this ruling modifies NY D88516.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY D88516 was published on June 5, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 23. One comment was received in response to the notice.

Facts:

The article in question is the small black bag component of the *Ultimate Auto Safety Kit*. The bag was made in China. In NY D88516, dated March 31, 1999, the bag is described initially as a PVC bag. However, the ruling noted that the cardboard packaging listed the bag component's composition as being of nylon fabric. The bag has a rectangular shape and measures 10.5 inches by 6 inches by 4.5 inches. It has a zippered opening along three sides and a fabric-carrying handle. The bag has only one main interior compartment.

The bag is made to store and carry the contents of the *Ultimate Auto Safety Kit*, an emergency roadside automobile kit, which includes: two 10 inch by 6 inch foam pads; a flashlight; two batteries (D size, 1.5 volt); a first aid kit; an emergency heat-reflective blanket; candles; matches; an "SOS" banner; an emergency rain poncho; a safety vest; a pair of polycotton knit gloves; aerosol tire sealant; a flare; a shop cloth; and booster cables.

In NY D88516, Customs classified the nylon bag component of the *Ultimate Auto Safety Kit* pursuant to GRI 5(a), with its contents (which were found not to comprise a set) and its value was prorated over the contents.

Issue:

Whether the nylon bag component of the *Ultimate Auto Safety Kit* is classified pursuant to GRI 5(a) Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

The classification of the bag components of emergency roadside automobile kits was addressed previously in HQ 964937, dated March 19, 2002 and HQ 965021, dated March 19, 2002. In both rulings, the bag components were described as soft-sided plastic, reinforced, zippered bags with straps. Customs determined that the kits were not sets pursuant to GRI 3(b) and classified the bag components individually in subheading 4202.92.90, HTSUSA.

The instant bag component is made of sturdy nylon fabric, and has straps, zippers, and one main compartment to contain emergency roadside assistance articles. The bag is substantially similar in function to the merchandise addressed in the aforementioned rulings and is classified accordingly in subheading 4202.92.9026, HTSUSA.

Although certain containers may be classified with the articles they are designed to hold, we do not find the instant bag to be a container pursuant to GRI 5(a), HTSUSA, which states:

> Camera cases, musical instruments, gun cases, drawing instrument cases, necklace cases and similar containers, specifically shaped or fitted to contain a specific article or set of articles, suitable for long-term use and entered with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character.

The intent of the language of GRI 5(a) and the ENs to GRI 5(a) is that a container is specifically shaped or fitted for, in this case, the contents it holds."[1] The nylon bag contains one main compartment which is not specially shaped or fitted to hold its contents. Thus, the instant bag does not satisfy the requirements of GRI 5(a), and it is separately classified from its contents pursuant to GRI 1.

In your comment, you requested that we provide a delayed effective date of this modification. Unfortunately, we are not able to provide an exception to the sixty-day effective date as provided within 19 U.S.C. 1625(c), which reads, in relevant part:

> A proposed interpretive ruling or decision which would—
>
> (1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
>
> (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;
>
> shall be published in the CUSTOMS BULLETIN * * * The final ruling or decision shall become effective 60 days after the date of its publication.

Thus, under 19 U.S.C. 1625(c) the delayed effective date of the change in classification of the container components of emergency roadside automobile kits will be sixty days from publication within the CUSTOMS BULLETIN.

Holding:

NY D88516, dated March 31, 1999, is hereby modified. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

The nylon bag component of the *Ultimate Auto Safety* is classified in subheading 4202.92.9026, HTSUSA, textile category 670, which provides for: "Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other, With outer surface of textile materials: Other: Of man-made fibers." The general column one duty rate is 18.1 percent *ad valorem*. There are no applicable quota/visa requirements for the products of World Trade Organization ("WTO") members. The textile category number above applies to merchandise produced in non-WTO countries.

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[1] The EN(I) to GRI 5(a) states: "This rule shall be taken to cover only those containers which "are specially shaped or fitted to contain a specific article or set of articles, i.e., they are designed specifically to accommodate the article for which they are intended."

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF PLASTIC-COATED, COTTON DENIM BASEBALL CAPS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of a ruling letter and revocation of treatment relating to the tariff classification of polyurethane plastic-coated, woven cotton denim baseball caps.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter relating to the tariff classification of polyurethane plastic-coated, woven cotton denim baseball caps under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Similarly, Customs intends to revoke any treatment previously accorded by it to substantially identical merchandise that is contrary to the position set forth in this notice. Comments are invited as to the correctness of the proposed action.

DATE: Comments must be received on or before September 13, 2002.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at U.S. Customs Service, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Teresa Frazier, Textiles Branch (202) 572–8821.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility"**. These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling letter relating to the classification of polyurethane plastic-coated, woven cotton baseball caps. Although in this notice Customs is specifically referring to Headquarters Ruling Letter (HQ) 960302, dated May 9, 1997, this notice covers any rulings on such merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. We note that HQ 084912, dated July 21, 1989, modified HQ 084261, dated June 15, 1989, properly reclassifying the items at issue. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the issues subject to this notice, should advise Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Any person involved in substantially identical

transactions should advise Customs during the notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 960302, dated May 9, 1997, Customs classified a polyurethane plastic-coated, woven cotton baseball cap, in subheading 6505.90.2590, HTSUSA, which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed: Other: Of cotton, flax or both: Other, Other." Since the issuance of this ruling, Customs has reviewed the classification of the baseball cap and has determined that the cited ruling is in error. Accordingly, we intend to revoke HQ 960302, as we find that the polyurethane plastic-coated, woven cotton baseball cap should be classified in subheading 6505.90.2060, HTSUSA, the provision for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: Certified hand-loomed and folklore products; and headwear of cotton, Other."

Pursuant to 19 U.S.C. §1625(c)(1), Customs intends to revoke HQ 960302 (see "Attachment A" to this document) and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 963537 (see "Attachment B" to this document).

Additionally, pursuant to 19 U.S.C. §1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 24, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Division Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 9, 1997.

CLA–2 RR:TC:TE 960302 jb
Category: Classification
Tariff No. 6505.90.2590

KENNETH G. WEIGEL, ESQ.
NANCY KAO, ESQ.
KIRKLAND & ELLIS
655 Fifteenth St, N.W.
Washington, DC 20005

Re: Classification of polyurethane coated denim baseball cap; fabric of heading 5903, HTSUS; GRI 1; chapter 65.

DEAR MR. WEIGEL AND MS. KAO:

This is in response to your letter addressed to our New York office, dated February 14, 1997, on behalf of your client, Humphreys Incorporated, requesting a binding ruling for a polyurethane coated denim baseball cap. In that letter you state that if the classification determined by our New York office for the subject merchandise is not consistent with what you believe to be the proper classification for the subject baseball cap, that this office have the opportunity to review the New York determination. A sample of the baseball cap was submitted for examination.

Facts:

The subject baseball cap is made of 100 percent cotton woven denim fabric coated with polyurethane. The baseball cap is made of six panels of fabric sewn together to form the crown, and a stiff visor. The top of the cap has metal-rimmed eyelet holes and a button peak, and at the base of the rear of the crown there is an adjustable plastic strap to conform to the wearer's head. The front of the cap also features an embroidered logo.

You state that the polyurethane coating is applied to the fabric before the fabric is cut and sewn into the completed cap. The polyurethane coating is transparent but is visible to the naked eye and gives the cap its shiny appearance. The polyurethane coating covers the top surface of the crown and both sides of the visor.

Our New York office has determined that the subject baseball hat is classifiable in heading 6505, HTSUS, based on the textile component. In your opinion, as the subject baseball cap is made of both plastic and textile materials, it is classifiable in both heading 6505, HTSUS, which provides for, among other things, hats and other headgear, of cotton, and heading 6506, HTSUS, which provides for, among other things, other headgear of rubber or plastics. Accordingly, you state a proper analysis must address either the essential character of the baseball cap, as per GRI 3(b), or if an essential character determination is not possible, a classification based on what occurs last in numerical order of those classifications meriting consideration. In either case, you state that the proper classification of the subject merchandise is in heading 6506, HTSUS.

Issue:

Whether the subject merchandise is classified in heading 6505, HTSUS, which provides for, among other things, hats and other headgear, of cotton, or heading 5606, HTSUS, which provides for, among other things, other headgear of rubber or plastics?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI's will be applied, in the order of their appearance.

In order to determine the proper classification for the subject merchandise, Customs must first make a determination regarding the fabric composition of the subject baseball cap. Heading 5903, HTSUS, provides for, textile fabrics impregnated, coated, covered or

laminated with plastics, other than those of heading 5902. Note 2(a) to chapter 59, states, in part, heading 5903 applies to:

> Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular), other than:
>
> (1) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapters 50 to 55, 58 or 60); for the purpose of this provision, no account should be taken of any resulting change of color;
>
> (2) Products which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C (usually chapter 39);
>
> (3) Products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of color (chapter 39);
>
> (4) Fabrics partially coated or partially covered with plastics and bearing designs resulting from these treatments (usually chapters 50 to 55, 58 or 60);
>
> (5) Plates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (chapter 39); or
>
> (6) Textile products of heading 5811.

In the case of the subject merchandise, as the textile fabric from which the baseball cap is made is not covered by the listed exceptions in Note 2(a), the baseball cap is constructed of a textile fabric provided for in heading 5903, HTSUS. Accordingly, our analysis is governed by GRI 1, and not as you assert, GRI 3(b) or (c).

Chapter 65, HTSUS, provides for, hats and other headgear, knitted or croched or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed. The subject baseball cap is made of woven cotton denim. Although chapter 65, HTSUS, does not contain a provision for headgear made up of fabrics of heading 5903, HTSUS, it does provide for headgear made up from other textile fabric. It follows that as fabric of heading 5903 is textile fabric, the baseball cap is classifiable within chapter 65. Accordingly, the subject baseball cap is properly classifiable in heading 6505, HTSUS.

Holding:

The subject merchandise is classifiable in subheading 6505.90.2590, HTSUSA, which provides for, hats and other headgear, knitted or crocheted or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hairnets of any material, whether or not lined or trimmed: other: of cotton, flax or both: not knitted: other; other. The applicable rate of duty is 7.8 percent ad valorem and the quota category is 859.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that your client check, close to the time of shipment, the Status Report On Current Import Quotas (Restraint Levels), an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 963537 TMF
Category: Classification
Tariff No. 6505.90.2060

KENNETH G. WEIGEL, ESQ.
KIRKLAND & ELLIS
655 Fifteenth Street, NW
Washington, DC 20005

Re: Revocation of HQ 960302; polyurethane-coated baseball cap; headgear/headwear.

DEAR MR. WEIGEL:

In Headquarters Ruling Letter (HQ) 960302, issued to you, May 9, 1997, on behalf of your client, Humphrey's International, a polyurethane-coated denim baseball cap was classified in subheading 6505.90.2590, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed: Other: Of cotton, flax or both: Other, Other."

Upon review of HQ 960302, Customs has determined that this merchandise was erroneously classified. Therefore, this ruling revokes HQ 960302.

Facts:

The baseball cap at issue in HQ 960302 was made of 100 percent woven cotton denim fabric that was coated with polyurethane material. It had six panels of fabric that were sewn together to form the crown, and a stiff visor. The top of the cap had metal-rimmed eyelet holes and a button peak, and at the base of the rear of the crown, there was an adjustable plastic strap to conform to the wearer's head. The front of the cap also featured an embroidered logo.

The polyurethane coating was applied to the fabric before the fabric was cut and sewn into the completed cap. The coating was transparent but visible to the naked eye and gave the cap a shiny appearance. The polyurethane coating covered the top surface of the crown and both sides of the visor.

Issue:

Whether the polyurethane-coated denim baseball cap is classified in subheading 6505.90.2060, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for headwear of cotton, or in subheading 6505.90.2590, HTSUSA, as headgear of cotton?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Where goods cannot be classified solely on the basis of GRI 1 and if the headings or legal notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUSA provisions under consideration are as follows:

6505	Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed:
6505.90	Other:
	Of cotton, flax or both:
	Not knitted:

6505.90.20	Certified hand-loomed and folklore products; and headwear of cotton,
6505.90.2060	Other
* * * * * * *	
6505.90.25	Other,
6505.90.2590	Other

The merchandise at issue is a woven cotton denim baseball cap that covers entirely the wearer's head. A cap is a type of headgear. *Merriam Webster's Collegiate Dictionary*, Tenth Edition (1999), defines headgear as a covering or protective device for the head. Rulings issued by Customs have based the definition of headgear on the *Random House Dictionary of the English Language*, Unabridged Edition (1983), which describes headgear as "any covering for the head, esp. a hat, cap, bonnet, etc." *See* HQ 087539, dated September 20, 1990.[1] In the instant case, the merchandise is described as a baseball cap that meets both definitions aforementioned. Further, the merchandise meets the definition of the term "cap," defined in *Merriam*, as "a head covering especially with a visor and no brim."

We refer to the General Explanatory Note to Chapter 65, which offers an expansive definition of the term "headgear":

> With the **exception** of the articles listed below [*see footnote* 2] this Chapter covers hat-shapes, hat-forms, hat bodies and hoods, and hats and other headgear of all kinds, irrespective of the materials of which they are made and of their intended use (daily wear, theatre, disguise, protection, etc.).
>
> It also covers hair-nets of any material and certain specified fittings for headgear.
>
> The hats and other headgear of this Chapter may incorporate trimmings of various kinds and of any material, including trimmings made of the materials of Chapter 71.

The instant cap is a type of headgear that is composed by sewing cut components of polyurethane-coated denim material together. The EN to heading 6505 state that the heading covers:

> Hats and headgear (whether or not lined or trimmed) made directly by knitting or crocheting (whether or not fulled or felted), or made up from lace, felt or other textile fabric in the piece, whether or not the fabric has been oiled, waxed, rubberised or otherwise impregnated or coated.
>
> It also includes hat-shapes made by sewing, but **not** hat-shapes or headgear made by sewing or otherwise assembling plaits or strips (heading 65.04).

The EN also state, in pertinent part, that the heading includes "Headgear made up from woven fabric, lace, net fabric, etc., such as chefs' hats, nuns' head-dresses, nurses' or waitresses' caps, etc., having clearly the character of headgear." As the instant article is a type of headgear made of plastic-coated, woven cotton denim material, it is classifiable within this heading.

In HQ 960302, the issue was whether the merchandise was classified according to its polyurethane coating or the denim textile fabric (both of which are provided, respectively within headings 6505 and 6506, HTSUSA). Customs resolved the issue by determining by

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[1] In HQ 087539, it is noted that "Certain articles (wigs, shawls, veils) which may be worn on the head are excluded from Chapter 65 either by the Chapter Notes or the Explanatory Notes, while other articles such as headphones are provided for in heading 8518, HTSUSA. Finally, we do not consider headbands, sweatbands and barrettes, which are worn on the head or in the hair in order to keep hair out of the eyes or off the forehead to be classifiable as headgear."

[2] The noted exceptions to Chapter 65 are as follows:

(a) Headgear for animals (heading 42.01).
(b) Shawls, scarves, mantillas, veils and the like (heading 61.17 or 62.14).
(c) Headgear showing signs of appreciable wear and presented in bulk, bales, sacks or similar bulk packings (heading 63.09).
(d) Wigs and the like (heading 67.04).
(e) Asbestos headgear (heading 68.12).
(f) Dolls' hats, other toy hats or carnival articles (Chapter 95).
(g) Various articles used as hat trimmings (buckles, clasps, badges, feathers, artificial flowers, etc.) when not incorporated in headgear (appropriate headings).

application of the exclusionary Note 2(a) to Chapter 59[3], that the constituent material of the subject merchandise was not excluded from classification within heading 5903 (as none of the listed exceptions applied), and accordingly classified the merchandise according to GRI 1.

Although we concur in part with the analysis of HQ 960302 with respect to the application of GRI 1 for determination of whether heading 6506 was an appropriate heading, we do not find it be controlling since the subject merchandise is provided *eo nomine* within subheading 6505.90.2060 as it is composed of cotton woven material.

In pertinent part, subheading 6505.90.20 provides *eo nomine* for headwear of cotton. We thus find that the instant cap, which is composed of plastic-coated, 100 percent cotton, is properly classified in subheading 6505.90.2060, HTSUSA. For additional rulings consistent with this determination, *see* HQ 958958, dated September 12, 1997 (classifying three separate styles of cotton caps within subheading 6505.90.2060, HTSUSA) and HQ 087825, dated September 5, 1990 (modifying HQ 087060, dated August 17, 1990 and classifying a woven 100% cotton twill cap within subheading 6505.90.2060).

Holding:

HQ 960302, dated May 9, 1997, is hereby revoked.

The polyurethane plastic-coated, cotton denim baseball cap is classified in subheading 6506.90.2060, HTSUSA, textile category 359, which provides for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: Certified hand-loomed and folklore products; and headwear of cotton, Other." The general column one duty rate is 7.6 percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

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[3] Note 2(a) to chapter 59, states that heading 5903 applies to: Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular), other than:

(1) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapters 50 to 55, 58 or 60); for the purpose of this provision, no account should be taken of any resulting change of color;

(2) Products which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15ºC and 30ºC (usually chapter 39);

(3) Products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of color (chapter 39);

(4) Fabrics partially coated or partially covered with plastics and bearing designs resulting from these treatments (usually chapters 50 to 55, 58 or 60);

(5) Plates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (chapter 39); or

(6) Textile products of heading 5811.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF A CERTAIN WOMAN'S UPPER BODY GARMENT

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation of a tariff classification ruling letter and treatment relating to the classification of a certain woman's upper body garment.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke one ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a certain woman's upper body garment. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before September 13, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, N.W., Washington D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Timothy Dodd, Textiles Branch: (202) 572–8819.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import re-

quirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke one ruling relating to the tariff classification of a certain woman's upper body garment. Although in this notice Customs is specifically referring to one New York Ruling Letter (NY), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to this notice.

In New York Ruling Letter (NY) E81679, dated June 17, 1999, the Customs Service classified a certain woman's upper body garment under subheading 6110.30.3055, HTSUSA, which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of man-made fibers: Other: Other: Other, Other: Women's or girls'." NY E81679 is set forth as "Attachment A" to this document.

It is now Customs determination that the proper classification for the certain woman's upper body garment is subheading 6114.30.1020, HTSUSA, which provides for "Other garments, knitted or crocheted: Of man-made fibers: Tops: Women's or girls'." Proposed Headquarters Ruling Letter (HQ) 965600 revoking NY E81679 is set forth as "Attachment B" to this document.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY E81679, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set

forth in Proposed HQ 965600, *supra*. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 30, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, June 17, 1999.
CLA–2–61:RR:NC:TA:359 E81679
Category: Classification
Tariff No. 6110.30.3055

MR. DAVID J. EVAN
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN
245 Park Avenue, 33rd Floor
New York, NY 10167–3397

Re: The tariff classification of a woman's pullover from China.

DEAR MR. EVAN:

In your letter dated April 30, 1999, on behalf of **Mast Industries, Inc.,** you requested a tariff classification ruling.

The submitted sample, **style number F84245,** is a woman's pullover that is constructed from 78% acrylic, 14% nylon, 8% spandex, knit fabric. The outer surface of the garment measures more than 9 stitches per 2 centimeters in the horizontal direction. The garment reaches the waist and has one long sleeve. There is shoulder coverage over one shoulder while the other shoulder is bare. Your sample is being returned as requested.

The applicable subheading for the pullover will be 6110.30.3055, Harmonized Tariff Schedule of the United States (HTS), which provides for women's pullovers, knitted: of man-made fibers: other. The duty rate will be 33.1% ad valorem.

The pullover falls within textile category designation 639. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the **U.S. Customs Service Textile Status Report,** an internal issuance of the U.S. Customs Service, which is available at the Customs Web Site at WWW.CUSTOMS.USTREAS.GOV. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mike Crowley at 212–637–6077.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 965600 ttd
Category: Classification
Tariff No. 6114.30.1020

MR. DAVID J. EVAN
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN
245 Park Avenue, 33rd Floor
New York, NY 10167–3397

Re: Revocation of New York Ruling Letter E81679, dated June, 17, 1999; Classification of a Woman's Upper Body Garment.

DEAR MR. EVAN:

This letter concerns New York Ruling Letter (NY) E81679, dated June 17, 1999, issued to you on behalf of Mast Industries, Inc., regarding the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a woman's pullover. After review of that ruling, Customs has determined that the classification of the woman's knit upper body garment in subheading 6110.30.3055, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes NY E81679.

Facts:

In NY E81679, Customs classified the merchandise at issue under subheading 6110.30.3055, HTSUSA, which provides for, among other things, women's man-made fiber pullovers. In that ruling, the subject article was described as follows:

> The submitted sample, style number F84245, is a woman's pullover that is constructed from 78% acrylic, 14% nylon, 8% spandex, knit fabric. The outer surface of the garment measures more than 9 stitches per 2 centimeters in the horizontal direction. The garment reaches the waist and has one long sleeve. There is shoulder coverage over one shoulder while the other shoulder is bare.

Issue:

What is the proper classification for the woman's knit upper body garment?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While neither binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

Following GRI 1, there are two headings under consideration: heading 6110, HTSUSA, which provides for, *inter alia*, women's knitted sweaters, pullovers and similar articles and heading 6114, HTSUSA, which provides for, *inter alia*, other women's knitted garments.

Heading 6110, HTSUSA, covers "[s]weaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted." A recent informed compliance publication on apparel terminology describes sweaters as:

> knit garments that cover the body from the neck or shoulders to the waist or below (as far as the mid-thigh or slightly below the mid-thigh). Sweaters may have any type of pocket treatment or any type of collar treatment, including a hood, or no collar, or any type of neckline. They may be pullover style or have a full or partial front or back opening. They may be sleeveless or have sleeves of any length. Those sweaters provided for at the statistical level (9^{th} and 10^{th} digit of the tariff number) have a stitch count of 9 or fewer stitches per 2 centimeters measured on the outer surface of the

> fabric, in the direction in which the stitches are formed. Also included in these statistical provisions are garments, known as sweaters, where, due to their construction (e.g., open-work raschel knitting), the stitches on the outer surface cannot be counted in the direction in which the stitches are formed. Garments with a full-front opening but which lack the proper stitch count for classification as a sweater may be considered "sweater-like" cardigans of heading 6110.

See, U.S. Customs Service, *What Every Member of the Trade Community Should Know About: Apparel Terminology Under the HTSUS,* 34 Cust. B. & Dec. 52, 153 (Dec 27, 2000).

Furthermore, reference to *The Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories,* CIE 13/88 (*Guidelines*) is appropriate in this case. The *Guidelines* were developed and revised in accordance with the HTSUSA to ensure uniformity, to facilitate statistical classification, and to assist in the determination of the appropriate textile categories established for the administration of the Arrangement Regarding International Trade in Textiles. The *Guidelines* provide a similar description for sweaters. Notably, the *Guidelines* indicate that garments commercially known as sweaters or pullovers cover the upper body from the neck or shoulders to the waist or below. The EN to heading 6110, HTSUSA, also indicate that the heading covers garments designed to cover the upper parts of the body.

Customs has consistently found that in order for a garment to be classified in heading 6110, HTSUSA, the garment must, at a minimum, feature adequate "coverage" of the upper part of the body. *See* HQ 965231, dated November 19, 2001; HQ 963597, dated December 21, 1999; HQ 962161, dated December 29, 1998; and HQ 962123, dated December 29, 1998. In the rulings cited, Customs found that garments with an upper back that was cut straight across from side seam to side seam lacked adequate shoulder coverage and failed to meet the requisite coverage requirement for classification in heading 6110, HTSUSA. The styling of the subject garment: shoulder coverage over one shoulder while the other shoulder is bare, lacks adequate shoulder coverage to satisfy the requisite coverage requirement for classification in heading 6110, HTSUSA. *See* HQ 965231 (cited above), (wherein Customs found that a pullover garment with one shoulder styling and a diagonally cut neckline, similar to the subject garment, did not meet the requisite adequate coverage of the upper body to be classified in heading 6110).

Heading 6114, HTSUSA, provides for "[o]ther garments, knitted or crocheted." The EN to heading 6114 state that, "this heading covers knitted or crocheted garments which are not included more specifically in the preceding headings of this Chapter." Accordingly, the subject garment, which because of distinct styling features is precluded from classification in headings 6106 and 6110, HTSUSA, is properly classified as an other garment of heading 6114. *See* HQ 963597 (cited above).

Subheading 6114.30.1020, HTSUSA, provides for "Other garments, knitted or crocheted: Of man-made fibers: Tops: Women's or girls." As the subject garment is made of man-made materials and is intended for women or girls, the remaining inquiry is whether the subject garment satisfies the definition of a "top."

The apparel terminology compliance publication describes "tops" as:

> Upper body garments that are not included more specifically in headings 6101–6113. Tops generally have limited coverage of the neck and shoulder area, and/or do not reach the waist. Garments lacking coverage of the neck and shoulder area may have shoulder straps, a halter neckline, or no straps. The front and/or back of the garment may be cut straight across from side seam to side seam. Terms sometimes used to describe these garments are halter-tops, tube tops or camisoles. All of these garments are classified in the specific subheading for tops in 6114.

See, U.S. Customs Service, *What Every Member of the Trade Community Should Know About: Apparel Terminology Under the HTSUS,* 34 Cust. B. & Dec. 52, 153 (Dec 27, 2000).

The *Guidelines* provide a similar description of "tops." Notably, the *Guidelines* specify that tops include tube-type garments which may or may not be waist length, having a straight top (with or without attached shoulder straps), and off-the-shoulder tops, which do not have a "neck-area" as required by the "shirt and blouse" *Guidelines*.

In this case, applying the description from the apparel terminology informed compliance publication, the subject garment provides only limited coverage to the shoulder area. Moreover, it is clear from both sources that a "top" may reach the waist. As the subject garment satisfies the definition of a "top," it is properly classified under subheading 6114.30.1020, HTSUSA, as "Other garments, knitted or crocheted: Of man-made fibers: Tops: Women's or girls'."

Holding:

The women's knit top is classified in subheading 6114.30.1020, HTSUSA, which provides for "[o]ther garments, knitted or crocheted: Of man-made fibers: Tops: women's or girls'." The general column one duty rate is 28.6 percent *ad valorem* and the item falls within textile category designation 639.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest your client check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available **for inspection** at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN UNFINISHED SHOE LACING MATERIALS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter and revocation of treatment relating to the classification of certain unfinished shoe lacing materials.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain unfinished shoe lacing materials. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before September 13, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S.

Customs Service, 799 9th Street, N.W., Washington D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Timothy Dodd, Textiles Branch: (202) 572–8819.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify one ruling relating to the tariff classification of certain unfinished shoe lacing materials. Although in this notice Customs is specifically referring to one New York Ruling Letter (NY), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person in-

volved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to this notice.

In New York Ruling Letter (NY) G82846, dated November 20, 2000, the Customs Service classified certain unfinished shoe lacing materials in the piece under subheading 5808.10.7000, HTSUSA, which provides for "Braids in the piece * * *: Other: Of cotton or man-made fibers." NY G82846 is set forth as "Attachment A" to this document.

It is now Customs determination that the proper classification for the certain unfinished shoe lacing materials in the piece is subheading 5806.32.2000, HTSUSA, which provides for "Narrow woven fabrics, other than goods of heading 5807; * * * Other woven fabrics: Of man-made fibers: Other." Proposed Headquarters Ruling Letter (HQ) 965492 modifying, in part, NY G82846 is set forth as "Attachment B" to this document.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify NY G82846, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed HQ 965492, *supra*. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 30, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 20, 2000.
CLA–2–63:RR:NC:TA:351 G82846
Category: Classification
Tariff No. 6307.90.5050,
6307.90.5020, and 5808.10.7000

KERRY W. KEATING
PRESIDENT AND CEO
MITCHELLACE, INC.
830 Murray Streetr
P.O. Box 89
Portsmouth, OH 45662–0089

Re: The tariff classification of shoe laces and lacings from Honduras made of U.S. components; eligibility under CBERN.

DEAR MR. KEATING:

In your letter dated October 11, 2000, you requested a tariff classification ruling on footwear laces and lacing imported in the piece and also a ruling on the eligibility of the merchandise under the Caribbean Basin Economic Recovery Act (CBERA). That letter was a follow-up to one of August 22, which we had to return for more information. Please note for the future that our usual procedure is to limit such requests to no more than five (5) items.

Your have submitted numerous samples of two types of footwear laces, some of which are flat braid and the balance tubular braid. You state that all braided laces and lacing, by which we assume you mean the tubular braids, "are braided on machines that have 8 carriers, 16 carriers or 44 carriers. Yarn is received on cones. The yarn is then wound onto braider bobbins. When loaded the bobbin is then placed on the carriers." You state that the woven laces, by which we assume you mean the flat braids, "are woven on needle looms. A varying number of ends of yarn are wound onto beams. The size braid determines the size of yarn to be used and the number of ends used. The beams are loaded behind the loom and threaded in certain patterns."

In an E-mail message of November 17 to National Import Specialist Mitchel Bayer, you attempted to clarify the difference between, on the one hand, your round braid laces and, on the other hand, cordage: "Our round shoe laces are made on braiders or looms that are tubular and in fact in most cases has a filler running through the center. Cordage is made on a solid cord braider and is not tubular such as blind cords or solid cords or ropes. It would seem us that flat and round shoe laces would be classified the same," presumably under subheading 6307.90 of the Harmonized Tariff Schedule of the United States (HTS), an opinion you stated in an earlier telephone conversation.

Your letter states that the finished laces may be imported in either of two ways: as packaged pairs, or in bulk to be paired and packaged in this country. The lacing, imported on rolls as piece goods ("continuous length"), is to be made up into finished footwear laces (cut to length and tipped) in this country. Please note that the imported finished footwear laces are considered "made up artides" for tariff purposes.

The applicable subheading for the following styles of finished shoe laces, 440TP, 440C, 4437TP, L4860, 4463SP, L8244SP, L1008, 4470SP, 5653TP, 344TP, L1017, 7441TP, 367, and 5441TP, all of flat braid, some of cotton and the balance of man-made fibers, will be 6307.90.50, HTS, which provides for "Other made-up articles: * * * Other: * * * Corset lacings, footwear lacings, or similar lacings." Those of cotton will be chssified in 6307.90.5010; those of man-made fibers will be classified in 6307.90.5020. The general rate of duty will be 3.2 percent ad valorem.

The applicable subheading for these same styles, if imported in the piece (lacing), will be 5808.10.7000, HTS, which provides for "Braids in the piece * * *: other: of cotton or mannade fibers." The general rate of duty will be 7.8 percent ad valorem.

Subheading 6307.90.5010 falls within textile category designation 369. Subheading 6307.90.5020 falls within textile category designation 669. Subheading 5808.10.7000 falls within textile category designation 229. However, based upon international textile trade agreements, products of Honduras are not at this time subject to quota restrictions or the requirement of a visa.

The question of classification for the following styles of finished shoelaces, 828, 1668, 1310R, 35 R, L1200, 16–287, 16310, 736SP, B811P, and 2152TP, all of tubular braid and made of either polyester or nylon, is being referred to the Office of Regulations and Rulings, U.S. Customs Service Headquarters, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229. A ruling will be issued to you from that office.

You also seek a ruling on the eligibility of this merchandise under the Caribbean Basin Economic Recovery Act ("CBERA"). The CBERA states that "textile and apparel articles which are subject to textile agreements" are not eligible for the duty-free treatment provided by the CBERA. 19 U.S.C. §2703(bX1). The Customs Regulations repeat this prohibition against textile and apparel articles subject to textile agreements receiving duty-free CBERA treatment at 19 C.F.R. §10.191(b)(2)(i). Goods classifiable under subheadings 5808.10.7000 or 6307.90.50, HTS, are subject to textile agreements, even though there are none in effect at this time with regards to Honduras. Thus, the laces which are the subject of this ruling are not entitled to duty-free treatment under CBERA.

Your original letter stated that the laces are manufactured from "100% USA raw materials. It is our understanding that there is no duty if USA raw materials are being used." Please be advised that there is no provision of law that allows duty-free treatment for goods produced with American components, unless the process is the mere assembly of such components; what you describe is a manufacturing, not assembly, process. Thus, duty-free treatment for your imported laces and lacing is not allowable.

This ruling is being issued under the provisions of Part 177 ofthe Customs Regulations (19 C.F.R 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 212–637–7086.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 965492 ttd
Category: Classification
Tariff No. 5806.32.2000

MR. KERRY W. KEATING
PRESIDENT AND CEO
MITCHELLACE, INC.
830 Murray Street
P.O. Box 89
Portsmouth, OH 45662–0089

Re: Modification of New York Ruling Letter G82846, dated November 20, 2000; Classification of Unfinished Shoe Lacings and Shoelaces.

DEAR MR. KEATING:

This letter concerns New York Ruling Letter (NY) G82846, issued to you on November 20, 2000, regarding the tariff classification of certain unfinished shoe lacings in the piece, and finished shoelaces under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). After review of that ruling, Customs has determined that the classification of four out the fourteen styles of unfinished shoe lacings in the piece in heading 5808, HTSUSA, was incorrect. For the reasons that follow, this ruling modifies, in part, NY G82846.

Facts:

The articles at issue are four styles of unfinished shoelacings in the piece, identified as style numbers L1017, L4860, L8244SP and L1008. In NY G82846, we incorrectly deter-

mined that when imported in the piece, these four styles would be classified under subheading 5808.10.7000, HTSUSA, which provides for "Braids in the piece * * *: Other: Of cotton or man-made fibers."

We note that the Customs National Commodity Specialist Division (NCSD) classified fourteen of twenty-four samples in NY G82846 and then forwarded the remaining ten styles to the Office of Regulations & Rulings to determine their proper tariff classification. In HQ 965230, dated April 30, 2002, we classified the remaining ten styles. In the process of completing HQ 965230, Customs inquired about the meaning of the letter "L" in the style number, of a related style (style number L811P considered in HQ 965230). You informed us that the "L" denotes "loom." Based on the fact that each style currently at issue has an "L" in the style number, we presume that each one was also made on a "loom." Accordingly, based on this assumption, this characteristic distinguishes the subject styles from being made on a braiding machine.

Issue:

What is the proper classification of the four styles of unfinished shoelacing material in the piece?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. *See* T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Heading 5808, HTSUSA, provides for, *inter alia*, braids in the piece. The EN to heading 5808, HTSUSA, provide in pertinent part:

(1) **Flat or tubular braids.**

* * * * * * *

Braid is made on special machines known as braiding or spindle machines.

* * * * * * *

In this case, based on our presumption that "L" denotes "loom," the subject styles were not made on special braiding or spindle machines. Accordingly, none of the four styles at issue are properly classifiable under heading 5808, HTSUSA, as braids in the piece.

Heading 5806, HTSUSA, provides for, among other things, narrow woven fabrics, other than goods of heading 5807. Heading 5807, HTSUSA, provides for "Labels, badges and similar articles of textile materials, in the piece, in strips or cut to shape or size, not embroidered." As the subject unfinished shoe lacing materials are not labels, badges or similar articles, they are precluded from classification in heading 5807, and therefore potentially classifiable in heading 5806.

In HQ 965230, issued to you on April 30, 2002, Customs classified style number L1200, in the piece, under subheading 5806.32.2000, HTSUSA. Style number L1200 was described as a tubular narrow woven fabric with a textile core. Before issuing that ruling, we inquired about the meaning of the letter "L" in the style number, of a related style (style number L811P also considered in HQ 965230). In response, you informed us that the "L" denotes "loom." Assuming the "L" in the style number denotes "loom", we found that style number L1200 is distinguished from being made on a braiding machine. Therefore, we found that style number L1200 was not properly classified in heading 5808, HTSUSA, as braids, in the piece. Rather, style number L1200, in the piece, was properly classified in subheading 5806.32.2000, HTSUSA, which provides for narrow woven fabrics of man-made fibers other than ribbon.

Assuming again that the "L" in the style number denotes "loom", style numbers L1017, L4860, L8244SP and L1008 are more accurately described as narrow woven fabrics. Accordingly, like style number L1200 in HQ 965230, the four styles, in the piece, are properly classified in heading 5806, HTSUSA, as narrow woven fabric of man-made fibers other than ribbon.

Holding:

Based on the assumption that the "L" in each style number represents "loom," style numbers L1017, L4860, L8244 and L1008, in the piece, are classifiable subheading 5806.32.2000, HTSUSA, which provides for "Narrow woven fabrics, other than goods of heading 5807; * * * Other woven fabrics: Of man-made fibers: Other." The current rate of duty is 6.4 percent *ad valorem* and the textile restraint category is 229.

NY G82846 is hereby modified, in part.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available **for inspection** at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED MODIFICATION AND REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF NURSING PADS AND THE COUNTRY OF ORIGIN OF NURSING PADS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed modification of a country of origin ruling letter, revocation of a tariff classification ruling letter and revocation of treatment relating to the classification and country of origin of nursing pads.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke one ruling and modify one ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), and the country of origin of nursing pads composed of woven fabrics formed in China, the United States and assembled in Canada. Customs also proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before September 13, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at: U.S. Customs Service, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at: (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: J. Steven Jarreau, Textiles Classification Branch: (202) 572–8817

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerged from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, 19 U.S.C. 1484, the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify one ruling letter relating to the country of origin and to revoke one ruling letter relating to the tariff classification of nursing pads composed of woven fabrics formed in China, the United States and assembled in Canada.

Although in this notice Customs is specifically referring to one Headquarters Ruling Letter and one New York Ruling Letter, this notice covers any rulings on this merchandise that may exist, but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, an internal advice memorandum or decision or a protest review decision) on the merchandise subject to this notice, which classified the merchandise contrary to this notice or which determined a contrary country of origin, should advise Customs during this comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)) as amended by sec-

tion 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importers or their agents for importation of merchandise subsequent to the effective date of the final decision on this notice.

The Customs Service in Headquarters Ruling Letters (HQ) 961238 (April 21, 1998) addressed the importer's entitlement to preferential tariff treatment pursuant to the North American Free Trade Agreement (NAFTA) and the country of origin of two styles of nursing pads. One style of nursing pad was composed entirely of woven cotton fabric formed in China and cut, joined together and edge-sewn in Canada. The second style of nursing pad was composed of woven cotton fabric formed in China, woven nylon fabric with a polyurethane coating formed in the United States and then cut, joined together and edge-sewn in Canada. The Customs Service in HQ 961238, relying on the merchandise being classified in subheading 6217.10.9510, HTSUSA, held that neither style nursing pad qualified for preferential tariff treatment pursuant to the NAFTA and that the country of origin of both styles of nursing pads was Canada. Headquarters Ruling Letter 961238 (April 21, 1998) is set forth as "Attachment A" to this document.

The Customs Service in New York (NY) Ruling Letter C81609 (Nov. 19, 1997) classified both styles of nursing pads in subheading 6217.10.9510, HTSUSA. New York Ruling Letter C81609 is set forth as "Attachment B" to this document.

It is now Customs determination that both styles of nursing pads are properly classified in subheading 6307.90.9889, HTSUSA, pursuant to the legal reasoning and analysis set forth in HQ 965711 (July 24, 2002) and proposed HQ 965750. Headquarters Ruling Letter 965711 is set forth as "Attachment C" to this document and proposed Headquarters Ruling Letter 965750 is set forth as "Attachment D" to this document.

It is now also Customs determination that the country of origin of both styles of nursing pads is China, pursuant to the legal reasoning and analysis set forth in proposed HQ 964387. The country of origin of the nursing pad composed entirely of woven cotton fabric formed in China and cut, joined together and edge-sewn in Canada is provided by 19 C.F.R. 102.21(c)(2). Paragraph (c)(2) of section 102.21, pursuant to paragraph (e), applicable when the country of origin can not be determined pursuant paragraph (c)(1), provides that the country of origin of goods classified in subheading 6307.90, HTSUS, shall be the country in which the fabric-making process occurred.

The country of origin of the nursing pad composed of woven cotton fabric formed in China, woven nylon fabric with a polyurethane coating formed in the United States and then cut, joined together and edge-sewn in Canada is provided by 19 C.F.R. 102.21(c)(4). Paragraph (c)(4) provides that the country of origin of goods that could not be determined pursuant to section 102.21(c)(1), (2) or (3), shall be the country in which the most important assembly or manufacturing process occurred. Proposed HQ 964387 is set forth as "Attachment E" to this document.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY C81609 and to modify HQ 961238, and any other rulings not specifically identified to reflect the proper classification and country of origin of the merchandise. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 24, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 21, 1998.

CLA-2 RR:TC:TE 961238 jb
Category: Classification

MR. OWEN HAIRSINE
ZEOTROPE HOLDINGS, LTD.
12993 80th Avenue
Surrey, British Columbia
Canada V3W 3B1

Re: Modification of NY C81609, dated November 19, 1997; country of origin of nursing pads; 102.21(c)(2); tariff shift.

DEAR MR. HAIRSINE:

On, November 19, 1997, our New York office issued to you New York Ruling Letter (NY) C81609 addressing the classification and country of origin of two styles of cotton nursing pads. A review of the file has revealed that although the classification determination for the subject merchandise is accurate, an inaccurate determination was made with respect to the origin of the subject merchandise. Additionally, we note that your question with respect to coverage under the North American Free Trade Agreement (NAFTA) for this merchandise was left unanswered. Accordingly, this letter will set out the proper analysis and country of origin determination for this merchandise.

Facts:

The subject merchandise consists of two styles of nursing pads, one with a breathable waterproof nylon backing, and one without this backing, made of 100 percent cotton wo-

ven fabric. As stated in your letter, dated November 2, 1997, the manufacturing operations for this merchandise are as follows:

China cotton flannelette fabric is formed (for both styles)

United States polyurethane coated nylon taffeta is formed (for style with waterproof backing only)

Canada cotton flannelette is cut into six pieces; three pieces with a triangle shape and three pieces with a half moon shape for styles with waterproof backing only, the waterproof breathable nylon is cut into two pieces (a triangle and a half moon) triangle and moon pieces are joined together using an off the arm seamier sewing machine for styles with waterproof backing only, the two nylon pieces are joined on a single needle sewing machine edge of the nursing pad is closed by using a serging sewing machine for styles with waterproof backing only, the cotton and nylon are attached by serging the edges of both pieces six nursing pads are packaged.

Issue:

1. Does the subject merchandise qualify for NAFTA treatment?
2. What is the proper country of origin for the subject merchandise?

Law and Analysis:

NAFTA Eligibility

The subject nursing pads undergo processing operations in Canada which is a party to the North American Free Trade Agreement (NAFTA). General Note 12, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), incorporates Article 401 of the NAFTA into the HTSUSA. Note 12(a) provides, in pertinent part:

* * * * * * *

(i) Goods that originate in the territory of a NAFTA party under the terms of subdivision (b) of this note and that qualify to be marked as goods of Canada under the terms of the marking rules * * * and are entered under a subheading for which a rate of duty appears in the "Special" subcolumn followed by the symbol "CA" in parentheses, are eligible for such duty rate * * *. [Emphasis added]

Accordingly, the nursing pads at issue will be eligible for the "Special" "CA" rate of duty provided it is a NAFTA "originating" good under General Note 12(b), HTSUSA, and it qualifies to be marked as a good of Canada. Note 12(b) provides in pertinent part.

For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "goods originating in the territory of a NAFTA party" only if—

(i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or

(ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—

(A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or

(B) the goods otherwise satisfy the applicable requirements of subdivisions (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or

(iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials; or

* * * * * * *

The subject merchandise qualifies for NAFTA treatment only if the provisions of General Note 12(b)(ii)(A) are met, that is, if the merchandise is transformed in the territory of Canada so that the non-originating material (the fabric formed in China) undergoes a change in tariff classification as described in subdivision (t).

As the nursing pads are classifiable in subheading 6217.10.9510, HTSUSA, subdivision (t), Chapter 62, rule 38, applies. That note states that:

A change to headings 6213 through 6217 from any other chapter, except from headings 5106 through 5113, 5204 through 5212, 5307 through 5308 or 5310 through 5311, chapter 54, or headings 5508 through 5516, 5801 through 5802 or 6001 through

6002, provided that the good is both cut and sewn or otherwise assembled in the territory of one or more of the NAFTA parties.

When the fabric for the subject nursing pads leave China it is classifiable within headings 5204 through 5212. As the headings covering woven fabrics of cotton are excepted by subdivision (t), chapter 62, rule 38, the terms of the note are not met. Accordingly, the subject nursing pads do not qualify for NAFTA treatment.

Country of origin

On December 8, 1994, the President signed into law the Uruguay Round Agreements Act. Section 334 of that Act provides new rules of origin for textiles and apparel entered, or withdrawn from warehouse, for consumption, on and after July 1, 1996. On September 5, 1995, Customs published Section 102.21, Customs Regulations, in the Federal Register, implementing Section 334 (60 FR 46188). Thus, effective July 1, 1996, the country of origin of a textile or apparel product shall be determined by sequential application of the general rules set forth in paragraphs (c)(1) through (5) of Section 102.21.

Paragraph (c)(1) states that "The country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced." As the subject merchandise is not wholly obtained or produced in a single country, territory or insular possession, paragraph (c)(1) of Section 102.21 is inapplicable.

Paragraph (c)(2) states that "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which the foreign material incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section."

Paragraph (e) states that "The following rules shall apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section:"

6215–6217	If the good consists of two or more component parts, a change to an assembled good of heading 6215 through 6217 from unassembled components, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.

The subject merchandise is classified in heading 6217, HTSUS. As the subject nursing pads are wholly assembled in a single country, Canada, the country of origin of the nursing pads is Canada.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 19, 1997.

CLA–2–62:RR:NC:3:353 C81609
Category: Classification
Tariff No. 6217.10.9510

MR. OWEN HAIRSINE
ZEOTROPE HOLDINGS LTD.
12993–80th Ave.,
Surrey, British Columbia
Canada V3W 3B1

Re: The tariff classification of nursing pads from China.

DEAR MR. HAIRSINE:

In your letter dated November 2, 1997, you requested a classification ruling.

The submitted samples are nursing pads which you state are composed of 100% cotton woven fabric. The nursing pads are of two styles. Both styles are comprised of three pieces

of fabric with a triangle shape and three with a half moon type shape. One style has a breathable coated nylon fabric on one side. The stated priccipal use in the United States for the pads are as an accessory to Nursing Brassiere.

The applicable subheading for the nursing pads will be 6217.10.9510, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other, Of cotton. The duty rate will be 15.2% ad valorem.

The nursing pads fall within textile category designation 359. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Martin Weiss at 212–466–5881.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 24, 2002.

CLA–2 RR:CR:TE 965711 jsj
Category: Classification
Tariff No. 6307.90.9889

MS. ESTELLE LEE
PRESIDENT, TL CARE
P.O. Box 77087
San Francisco, CA 94107

Re: Nursing Pads; Breast Pads; Paper Absorbent Component; Textile Wadding Absorbent Component; Woven Textile Fabric Absorbent Component; Nonwoven Textile Fabric, But Not Wadding Absorbent Component; General Rules of Interpretation 1 and 3(b); Essential Character; Headings 4818, 5601 and 6307, HTSUS; Not Clothing Accessories, Heading 6217, HTSUS; Woven Cotton Absorbent Component; Subheading 6307.90.9889, HTSUSA.

DEAR MS. LEE:

The purpose of this correspondence is to respond to your request dated April 25, 2002. The correspondence in issue requested a binding classification ruling of the merchandise described as a "nursing pad."

This ruling is being issued subsequent to the following: (1) A review of your submission dated April 25, 2002; and (2) An examination of the sample that accompanied your ruling request.

Facts:

The article in issue, identified as a nursing pad, is designed to be placed in the brassiere of nursing mothers to absorb excess milk. It is circular or slightly conical in shape and

measures five (5) inches in diameter. The nursing pad is composed entirely of four (4) layers of 100 percent woven cotton fabric stated to be flannel. No other materials form a part of this article. The circumference is sewn.

This merchandise is also commonly referred to as "breast pads." The Customs Service, for convenience purposes, will refer to this item as a nursing pad.

The Customs Service is advised that the country of manufacture is China.

Issue:

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described nursing pad composed entirely of woven cotton fabric[1]?

Law and Analysis:

The federal agency responsible for initially interpreting and applying the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is the U.S. Customs Service.[2] The Customs Service, in accordance with its legislative mandate, classifies imported merchandise pursuant to the General Rules of Interpretation (GRI) and the Additional U.S. Rules of Interpretation.[3]

General Rule of Interpretation 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." *General Rule of Interpretation 1.* General Rule of Interpretation 1 further states that merchandise which cannot be classified in accordance with the dictates of GRI 1 should be classified pursuant to the other General Rules of Interpretation, provided the HTSUSA chapter headings or notes do not require otherwise. According to the Explanatory Notes (EN), the phrase in GRI 1, "provided such headings or notes do not otherwise require," is intended to "make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount." *General Rules for the Interpretation of the Harmonized System, Rule 1, Explanatory Note (V).*

The Explanatory Notes constitute the official interpretation of the Harmonized System at the international level. *See* Joint Explanatory Statement *supra* note 2, at 549. The Explanatory Notes, although neither legally binding nor dispositive of classification issues, do provide commentary on the scope of each heading of the HTSUS. The EN's are generally indicative of the proper interpretation of the headings. *See* T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989); *Lonza, Inc. v. United States*, 46 F. 3rd 1098, 1109 (Fed. Cir. 1995).

The Customs Service, observing the dictates of GRI 1, to classify merchandise according to the terms of the headings and the section and chapter notes, has encountered significant difficulty in the classification of nursing pads. Nursing pads, as previously explained, are items used by nursing mothers to absorb excess breast milk during lactation. Nursing pads may be used for other purposes, but it is Customs conclusion that any use of nursing pads other than by nursing mothers to absorb excess milk is fugitive.

The difficulty encountered by Customs in classifying this merchandise stems from two facts: (1) Nursing pads are not designated *eo nomine* in the tariff schedule; and (2) The manufacturers of nursing pads utilize different materials, primarily different absorbent material, to construct their products. Customs commenced the classification of this merchandise with this understanding.

Customs survey of nursing pads indicates that they are manufactured utilizing primarily four types of absorbent material: (1) Paper and/or paper pulp; (2) Textile wadding; (3) Woven textile fabrics; and (4) Nonwoven textile fabrics that are not wadding. It is not Customs intention to suggest that this list is exclusive. Other absorbent materials may be used in the manufacture of nursing pads either presently or in the future. The four primary types of absorbent material addressed above, for the purposes of this ruling letter, are not in composition with any type of super absorbent chemical compound.

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[1] All aspects of this article are composed of woven cotton fabric, including the absorbent layer.

[2] *See* 19 U.S.C. 1500 (West 1999) (providing that the Customs Service is responsible for fixing the final appraisement, classification and amount of duty to be paid); *See also* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 100–576, at 549 (1988) *reprinted in* 1988 U.S. Code Cong. and Adm. News 1547, 1582 [hereinafter Joint Explanatory Statement].

[3] *See* 19 U.S. C. 1202 (West 1999); *See generally, What Every Member of The Trade Community Should Know About: Tariff Classification*, an Informed Compliance Publication of the Customs Service available on the World Wide Web site of the Customs Service at www.customs.gov, search "Importing & Exporting" and then "U.S. Customs Informed Compliance Publications."

Since the tariff schedule does not designate nursing pads, *eo nomine*, that is by name, in any of the headings, Customs has determined that it is not possible to classify all nursing pads in a single heading. Failing to confirm a single heading into which all nursing pads may be properly classified, Customs re-examined the GRI's, gave careful thought to the ruling requests and protests currently pending in the Office of Regulations and Rulings and reviewed the classification history of this line of merchandise. The decision was made, pursuant to the requirements of the GRI's, to classify each article on its own merits.

The Customs Service, pursuant to the principles of "informed compliance" and "shared responsibilities" set forth in the Customs Modernization Act,[4] has determined that in order for the trade community to understand Customs reasoning, it is important to address in this ruling letter Customs thought process with regards to the classification of nursing pads. It is Customs judgment because of the different ways in which different types of nursing pads are manufactured that providing comprehensive analysis of the classification of the different types of nursing pads will result in a more uniform and correct classification of this merchandise.

Simply addressing TL Care's nursing pad would meet Customs legal obligation, but that would only inform Customs field personnel and the trade of the classification of one type of nursing pad. Only a complete and thorough discussion of the classification of the different types of nursing pads can result in the uniformity sought by Customs and the accurate classification of merchandise required of the trade.

The Customs Service will initially provide analysis of the headings that the agency has concluded are relevant to the classification of nursing pads. This ruling letter will conclude with the classification of the TL Care nursing pad.

It is the understanding of the Customs Service, as previously stated, that there are four primary types of nursing pads based on absorbent properties. The primary types of nursing pads include those with the following types of absorbent material: (1) Paper; (2) Textile wadding; (3) Woven textile fabrics; and (4) Nonwoven textile fabrics that are not wadding. Customs will address the classification, at the heading level, of nursing pads with each of these absorbent materials.

It is important to note that nursing pads are generally not composed entirely of the same material that provides the nursing pad with its absorbent capability. Although Customs focus, as will be addressed subsequently, will be on the material or substance that provides a nursing pad with its absorbent capability, proper application of the GRI's mandate that Customs not ignore the other materials or substances which make-up a particular style of nursing pads.

Nursing Pads of Heading 4818

Nursing Pads Composed Entirely if Materials Enumerated in Heading 4818

Commencing the classification of nursing pads composed entirely of paper pulp, paper, cellulose wadding or webs of cellulose fibers, these nursing pads, in accordance with the dictates of GRI 1, are classified according to the terms of heading 4818, HTSUS. Heading 4818, HTSUS, provides for the classification of: Toilet paper and similar paper * * * of a kind used for household or sanitary purposes; * * * *diapers, tampons, bed sheets and similar household, sanitary or hospital articles*, articles of apparel and clothing accessories, of paper pulp, paper, cellulose wadding or webs of cellulose fibers. (Emphasis added).

Explanatory Note 48.18 provides that heading 4818, HTSUS, addresses the classification of "household, sanitary or other hospital articles * * * of paper pulp, paper, cellulose wadding or webs of cellulose fibres." *Explanatory Note 44.18*. Sanitary articles, in accordance with the definition of "sanitary" in Webster's New Collegiate Dictionary are articles "of or relating to health." *Webster's New Collegiate Dictionary*, G. & C. Merriam Company (1977). It is the judgment of this office that nursing pads, designed to absorb excess milk from nursing mothers, are sanitary articles for the purposes of the tariff schedule and are similar to diapers and tampons, the sanitary articles designated *eo nomine* in heading 4818, HTSUS.

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[4] *See generally* North American Free Trade Implementation Act, Pub. L. 103–183, 107 Stat. 2057 (1993); *See also* Customs Modernization and Informed Compliance Act: Hearing on H.R. 3935 Before the House Comm. on Ways and Means, Subcomm. On Trade, 102nd Cong. 91 (1992) (statement of Carol Hallett, Commissioner, U. S. Customs Service) "Customs must do a better job of informing the trade community of how Customs does business; and the trade community must do a better job to assure compliance with U. S. trade laws."

It is, therefore, Customs determination that nursing pads composed entirely of paper pulp, paper, cellulose wadding or webs of cellulose fibers are properly classified, pursuant to GRI 1, in heading 4818, HTSUS.

Nursing Pads With Components of Paper Pulp, Paper, Cellulose Wadding or Webs of Cellulose fibers and of Textile Fabrics

Nursing pads for which the absorbent capability is provided by paper pulp, paper, cellulose wadding or webs of cellulose fibers, but which are not composed entirely of the materials enumerated in heading 4818, may not be classified pursuant to GRI 1 in heading 4818, HTSUS. These nursing pads generally have an absorbent inner layer or layers composed of paper pulp, paper, cellulose wadding or webs of cellulose fibers, but the outer layer or layers, those layers not primarily designed and intended to provide the article with its absorbent property, may generally be composed of one or more textile fabrics. The outer layer or layers may be, among other fabrics, lace, nonwoven fabrics or woven fabrics.

Nursing pads with an outer component of a textile fabric or fabrics and with an inner absorbent component of paper pulp, paper, cellulose wadding or webs of cellulose fibers may not be classified pursuant to GRI 1. A review of the terms of the headings of the HTSUS and the relevant section and chapter notes does not establish a heading into which an article of this nature may be properly classified, pursuant to GRI 1.

Having determined that General Rule of Interpretation 1 does not resolve this classification matter, the Customs Service reviewed GRI 2. Since nursing pads composed of an outer component of textile fabrics and with an inner absorbent component of the materials enumerated in heading 4818, HTSUS, that is, paper pulp, paper, cellulose wadding or webs of cellulose fibers, are not incomplete, unfinished, unassembled or disassembled articles, GRI 2(a) does not offer assistance. General Rule of Interpretation 2(b) does provide classification guidance.

General Rule of Interpretation 2(b) provides, in part, that "[t]he classification of goods consisting of more than one material or substance shall be classified according to the principles of rule 3." Since the nursing pad subject to this discussion is composed of both a textile fabric component and a component of materials enumerated in heading 4818, HTSUS, it is composed of more than one material and resort must be had to GRI 3.

The initial sentence of General Rule of Interpretation 3 provides that "[w]hen, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be * * *" according to GRI 3(a), (b) or (c). The nursing pads subject to this discussion are, *prima facie*, classifiable in two headings. They are classifiable as "made up articles" of heading 6307, HTSUS, because of the textile fabric component and also as an article of heading 4818, HTSUS, because of their similarity to the *eo nomine* articles and composition of paper pulp, paper, cellulose wadding or webs of cellulose fibers.

General Rule of Interpretation 3(a) states that "when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods * * * those headings are to be regarded as equally specific in relation to the goods, even if one of them gives a more complete or precise description of the goods." The nursing pad subject to this discussion is a composite good[5] and the headings under classification consideration each refer to only part of the materials in the good. Customs will, for that reason, turn to GRI 3(b).

General Rule of Interpretation 3(b) provides, in part, that "composite goods * * * made up of different components * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the * * * component which gives them their essential character, insofar as this criterion is applicable." The GRI's do not provide a definition for the phrase "essential character," but the EN's suggest an illustrative list of factors to consider. Explanatory Note Rule 3(b) (VIII) states that the factors that may be relevant to the determination of "essential character" "will vary between different kinds of goods," but may include the nature of the material or component, its bulk, its quantity, its weight, its value or the role played by the constituent material in relation to the use of the good. *General Rules for the Interpretation of the Harmonized System, Rule 3 (b) Explanatory Note (VIII).*

It is the conclusion of the Customs Service that the absorbent component composed of a material enumerated in heading 4818, HTSUS, is the component that gives the nursing

[5] *See generally General Rules for the Interpretation of the Harmonized System, Rule 3(b) Explanatory Note (IX)* (providing, in part, that composite goods include goods made up of different components in which "the components are attached to each other to form a practically inseparable whole").

pad its essential character. The absorbent material component plays the greatest role in the nursing pad, the absorption of excess milk during lactation. It is also the component that provides the nursing pad with its greatest bulk.

It is, therefore, Customs determination that nursing pads composed of an outer component of a textile fabric or fabrics and with an inner absorbent component of paper pulp, paper, cellulose wadding or webs of cellulose fibers are properly classified, pursuant to GRI 3(b), in heading 4818, HTSUS, as a similar sanitary article.

Nursing Pads of Textile Wadding—Heading 5601

Composed Entirely of Textile Wadding

Commencing the classification of nursing pads composed entirely of textile wadding, these nursing pads, pursuant to GRI 1, are properly classified in heading 5601, HTSUS. Heading 5601, HTSUS, provides for the classification of "Wadding of textile materials and articles thereof; textile fibers, not extending 5 mm in length (flock), textile dust and mill neps."

Wadding, as described by the EN's is "made by superimposing several layers of carded or air-laid textile fibres one on the other, and then compressing them in order to increase the cohesion of the fibres." *Explanatory Note 56.01(A).* It is noted that in order for an article to be wadding, the fibers must be readily separable, such as is possible with cotton balls frequently found in medicine bottles. *See Explanatory Note 56.01(A).*

Heading 5601, HTSUS, provides for the classification of articles of "[w]adding of textile materials." The Explanatory Notes reinforce the classification of nursing pads composed entirely of textile wadding in heading 5601, HTSUS. Explanatory Note 56.01(A)(2) sets forth that "[s]anitary towels and tampons, napkins (diapers) and napkin liners for babies and similar sanitary articles consisting of wadding, whether or not with knitted or loosely woven open-work covering" are classified in heading 5601, HTSUS. Customs, as previously addressed, has concluded that nursing pads are similar to sanitary articles.

It is, therefore, Customs determination that nursing pads composed entirely of textile wadding are properly classified, pursuant to GRI 1, in heading 5601, HTSUS, as articles of wadding of textile materials.

Nursing Pads With Components of Textile Wadding and of Textile Fabrics

Nursing pads for which the absorbent capability is provided by textile wadding, but which are not composed entirely of textile wadding, may not be classified pursuant to GRI 1 in heading 5601, HTSUS. These nursing pads generally have an absorbent inner component of textile wadding, but also have outer components, not primarily designed and intended to provide the article with its absorbent property, composed of one or more textile fabrics. The outer components may be, among other fabrics, lace, nonwoven fabrics that are not wadding or woven fabrics.

Nursing pads composed of an outer component of textile fabric and with an inner absorbent component of textile wadding may not be classified pursuant to GRI 1. A review of the terms of the headings of the HTSUS and the relevant section and chapter notes does not establish a heading into which an article of this nature is properly classifiable, pursuant to GRI 1.

Having determined that General Rule of Interpretation 1 does not resolve this classification matter, the Customs Service reviewed GRI 2. Since nursing pads composed of an outer component of textile fabrics and an inner absorbent component of textile wadding are not incomplete, unfinished, unassembled or disassembled articles, GRI 2(a) does not offer assistance. General Rule of Interpretation 2(b) does provide classification guidance.

General Rule of Interpretation 2(b) provides, in part, that "[t]he classification of goods consisting of more than one material or substance shall be classified according to the principles of rule 3." Since the nursing pad subject to this discussion is composed of both textile fabrics and textile wadding, it is composed of more than one material and resort must be had to GRI 3.

The initial sentence of General Rule of Interpretation 3 provides that "[w]hen, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be * * *" according to GRI 3(a), (b) or (c). The nursing pads subject to this discussion are, *prima facie*, classifiable in two headings. They are classifiable as "made up articles" of heading 6307, HTSUS, because of the textile fabric component and also as an article of "[w]adding of textile materials" of heading 5601, HTSUS, because of the textile wadding component. *See* Headings 5601 and 6307, HTSUS.

General Rule of Interpretation 3(a) states that "when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods * * * those headings are to be regarded as equally specific in relation to the goods, even if one of them gives a more complete or precise description of the goods." The nursing pad subject to this discussion is a composite good and the headings under classification consideration each refer to only part of the materials in the good. Customs will, for that reason, turn to GRI 3(b).

General Rule of Interpretation 3(b) provides, in part, that "composite goods * * * made up of different components * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the * * * component which gives them their essential character, insofar as this criterion is applicable." The GRI's do not provide a definition for the phrase "essential character," but the EN's suggest an illustrative list of factors to consider. Explanatory Note Rule 3(b) (VIII) states that the factors which may be relevant to the determination of "essential character" "will vary between different kinds of goods," but may include the nature of the material or component, its bulk, its quantity, its weight, its value or the role played by the constituent material in relation to the use of the good. *General Rules for the Interpretation of the Harmonized System, Rule 3 (b) Explanatory Note (VIII).*

It is the conclusion of the Customs Service that the inner absorbent component composed of textile wadding is the component that gives the nursing pad its essential character. The absorbent component plays the greatest role in the nursing pad, the absorption of excess milk during lactation. It is also the component that provides the nursing pad with its greatest bulk.

It is, therefore, Customs determination that nursing pads composed of an outer component of textile fabrics and with an inner absorbent component of textile wadding are properly classified, pursuant to GRI 3(b), in heading 5601, HTSUS, as articles of wadding of textile materials.

Nursing Pads of Woven Fabric or of Nonwoven Fabric, But Not Wadding—Heading 6307

Heading 6307, HTSUSA, a residual heading, provides for the classification of "Other made up articles, including dress patterns." It is Customs determination, pursuant to GRI 1, that heading 6307, HTSUSA, and no other heading, provides for the classification of nursing pads composed entirely of woven textile fabrics or of nonwoven textile fabrics that are not wadding.[6]

The expression "made up," as used in heading 6307, HTSUSA, is defined in Section XI, note 7. "Made up," pursuant to the section note, means articles,

> (a) Cut otherwise than into squares or rectangles;
>
> (b) Produced in the finished state, ready for use (or merely needing separation by cutting dividing threads) without sewing or other working (for example, certain dusters, towels, tablecloths, scarf squares, blankets);
>
> (c) Hemmed or with rolled edges, or with a knotted fringe at any of the edges, but excluding fabrics the cut edges of which have been prevented from unravelling by whipping or by other simple means;
>
> (d) Cut to size and having undergone a process of drawn thread work;
>
> (e) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded); or
>
> (f) Knitted or crocheted to shape, whether presented as separate items or in the form of a number of items in the length.

The Explanatory Notes to heading 6307, HTSUSA, indicate that this heading is intended to include made up articles of any textile material, provided the articles are **"not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature." *Explanatory Note 63.07.* Explanatory Note 63.07 further provides that made up articles include "[s]anitary towels (**excluding** those of **heading 56.01**).[7]" *Explanatory Note 63.07 (14).* The EN's do not define "sanitary towels," but a review of the Explanatory Notes to heading 5601, HTSUS, suggests that sanitary towels are similar to "[s]anitary * * * tampons, napkins (diapers) and napkin liners for babies and similar sanitary articles

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[6] A nonwoven textile fabric may upon initial examination appear to be wadding. If the textile fibers are not "readily separable," the material is not wadding, but rather a nonwoven textile fabric.

[7] The sanitary towels excluded from heading 6307, HTSUS, would be those with an absorbent component of textile wadding, the material of heading 5601, HTSUS, articles.

* * *." *Explanatory Note 56.01(A)(3).* These sanitary articles are similar to those addressed in the analysis of heading 4818, HTSUS. The reasoning set forth concerning sanitary articles of heading 4818, HTSUS, is equally applicable to sanitary towels and articles of heading 6307, HTSUS.

It is, therefore, Customs determination that nursing pads composed entirely of woven textile fabrics or of nonwoven textile fabrics that are not wadding are not included more specifically elsewhere in the schedule, that they are described by section XI, note 7 and are properly classified at the heading level in heading 6307, HTSUS. Sanitary towels referenced in the Explanatory Notes, which Customs notes is not a term routinely employed in the United States, are a type of sanitary article. Nursing pads, as addressed previously, are sanitary articles.

Clothing Accessories and Heading 6217

The Customs Service has previously issued ruling letters classifying nursing pads, without regard to the material or substance that afforded the article its absorbent capability, in heading 6217, HTSUS. Heading 6217, HTSUS, provides, in part, for the classification of "Other made up *clothing accessories* * * *." (Emphasis added). Customs has now determined, subsequent to an exhaustive review of the tariff schedule and the Explanatory Notes, that nursing pads are not clothing accessories and should not be classified in heading 6217, HTSUS.

Customs conclusion that nursing pads were clothing accessories was based on a review of the Explanatory Notes and the decision that nursing pads are "accessories," that is, that they are secondary or subordinate in importance to clothing articles, adding to the beauty, convenience and effectiveness of the article. It is now Customs determination that nursing pads are not "accessories" and that Explanatory Note 62.17, when read in its entirety, does not support the classification of nursing pads in heading 6217, HTSUS.

Explanatory Note 62.17 lists twelve categories of articles that should be classified as clothing accessories, or as parts of garments or clothing accessories. The items enumerated in EN 62.17 include: dress shields; shoulder or other pads; belts of all kinds (including bandoliers) and sashes; muffs; sleeve protectors; sailor's collars; epaulettes and brassards; labels, badges, emblems, "flashes" and the like; frogs and lanyards; separately presented removable linings for raincoats and similar garments; pockets, sleeves, collars, collarlettes, wimples, fallals of various kinds, cuffs, yokes, lapels and similar items; and stockings, socks and sockettes.

Customs had previously placed considerable emphasis on the similarities between dress shields and shoulder pads, and nursing pads. It is now the determination of this office that Customs should not focus on only dress shields and shoulder pads when attempting to draw analogies to nursing pads, but must take into consideration all of the items listed in the Explanatory Note.

Nursing pads, like dress shields, are worn in addition to the wearer's clothing and do protect the wearer's clothing from perspiration staining. Dress shields, unlike nursing pads, are principally intended to protect the wearer's clothing. While nursing pads will protect the wearer's brassiere and outer garment from possible staining, its primary use is to absorb excess milk, not protect the wearer's clothing, particularly the brassiere. Nursing mothers wear nursing brassieres for a limited period of time and concerns about staining are minimal. Customs notes that nursing pads are generally purchased from maternity stores or drug stores, where as dress shields are generally purchased in fabric stores.

Shoulder pads are designed and intended to complement the wearer's clothing and, unlike nursing pads, have no protective function. Customs, as previously discussed, has concluded that the use of nursing pads for any purpose other than the absorption of excess milk during lactation is fugitive. Should pads, in this regard, are not analogous to nursing pads.

A review of all of the items listed in EN 62.17 convinces Customs that nursing pads are not properly classified in heading 62.17, HTSUS. While nursing pads do have similarities with dress shields and shoulder pads, particularly dress shields, Customs concludes that a fair and accurate interpretation of EN 62.17 necessitates that nursing pads be compared to all of the items listed. When the features and uses of nursing pads are weighted against the features and uses of all of the items enumerated in EN 62.17, it is evident to Customs that nursing pads are not sufficiently analogous and should not be classified in heading 6217, HTSUS. Nursing pads have little or nothing in common with items such as belts, sashes muffs, sleeve protectors, sailor's collars, epaulettes, brassards, labels, badges, em-

blems, "flashes," frogs, lanyards, removable linings for raincoats, pockets, sleeves, collars, collarlettes, wimples, fallals, cuffs, yokes, lapels, stockings, socks and sockettes.

The Customs Service is aware of HQ 963488 (May 2, 2000) and NY D82853 (Oct. 16, 1998) classify similar nursing pads as clothing accessories in heading 6217, HTSUS. Customs is re-examining the classification of this merchandise in heading 6217, HTSUS. If a decision is made to reclassify the merchandise in the identified ruling letters, the Customs Service will proceed in accordance with 19 U.S.C. 1625 (c).

TL Care's Nursing Pad of Woven Cotton Fabric

Commencing classification of the TL Care nursing pad, in accordance with the dictates of GRI 1, the Customs Service examined the headings of the HTSUSA. Heading 6307, HTSUSA, a residual heading, provides for the classification of "Other made up articles, including dress patterns." It is Customs determination, as previously set forth in this ruling letter, that heading 6307, HTSUSA, and no other heading, provides for the classification of nursing pads composed entirely of woven cotton fabric.

It is Customs determination that nursing pads composed entirely of woven cotton fabric are not included more specifically elsewhere in the schedule and that they are articles assembled by sewing, gumming or otherwise as describe by section XI, note 7 (e). Nursing pads, as previously resolved, are sanitary articles similar to sanitary towels.

Continuing the classification of TL Care's nursing pad composed solely of four layers of 100 percent woven cotton fabric, the article is classified in subheading 6307.90.9889, HTSUSA. Subheading 6307.90.9889, HTSUSA, provides for the classification of:

6307	Other made up articles, including dress patterns:
6307.90	Other:
	Other:
6307.90.98	Other,
	Other:
6307.90.9889	Other.

Holding:

The TL Care nursing pad, composed entirely of woven cotton fabric, is classified in subheading 6730.90.9889, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty is seven (7) percent, *ad valorem*.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 965750 jsj
Category: Classification
Tariff No. 6307.90.9889

MR. OWEN HAIRSINE
ZEOTROPE HOLDINGS, LTD.
12993 80th Avenue
Surrey, British Columbia
Canada V3W 3B1

Re: Reconsideration and Revocation of NY C81609 (Nov. 19, 1997); Nursing Pads; Breast Pads; Woven Absorbent Material; Subheading 6307.90.9889, HTSUSA; HQ 965711 (July 24, 2002) Incorporated by Reference.

DEAR MR. HAIRSINE:

The purpose of this correspondence is to advise you that the Customs Service has reconsidered New York Ruling Letter C81609 (Nov. 19, 1997).

The Customs Service in New York Ruling Letter C81609 classified two nursing pads, one composed entirely of woven cotton fabric and the other composed of woven cotton fabric with an outer layer of polyurethane coated woven nylon fabric, in subheading 6217.10.9510, HTSUSA. The Customs Service has reviewed NY C81609 and determined that it is not correct.

Customs is revoking NY C81609. The nursing pads, one composed entirely of woven cotton fabric and the other composed of woven cotton fabric with an outer layer of polyurethane coated woven nylon fabric, are classified in subheading 6307.90.9889, HTSUSA. The reasoning and analysis addressing Customs decision is provided in this ruling letter.

Facts:

The articles in issue are two styles of nursing pads.

Style one is composed solely of 100 percent woven cotton fabric. The fabric is cut into three pieces with triangular shapes and three pieces in the shape of half-moons.

Style two is identical to style one, with the exception that it has a breathable polyurethane coated woven nylon fabric on one side of the article. It is Customs understanding that it is the woven cotton fabric which provides this article with its absorbent capability.

Issue:

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described nursing pads, one composed entirely of woven cotton fabric and the other composed of woven cotton fabric with an outer layer of polyurethane coated woven nylon fabric?

Law and Analysis:

The Customs Service in Headquarters Ruling Letter 965711 (July 24, 2002) provided classification analysis, at the heading level for heading 6307, HTSUS, for nursing pads substantially similar to those in this ruling letter, composed entirely of woven cotton fabric and composed of woven cotton fabric with an outer layer of polyurethane coated woven nylon fabric. Heading 6307, HTSUS, a residual or basket provision, provides for the classification of "[o]ther made up articles, including dress patterns."

The legal reasoning and analysis addressing the classification, at the heading level, in heading 6307, HTSUS, of nursing pads composed entirely of woven cotton fabric and composed of woven cotton fabric with an outer layer of polyurethane coated woven nylon fabric set forth in HQ 965711 is incorporated into this ruling letter by reference. Headquarters Ruling Letter 965711 is attached to and made a part of this ruling letter.

Continuing the classification of Zeotrope Holdings' nursing pad, at the subheading level, Zeotrope's nursing pads composed entirely of woven cotton fabric and composed of woven cotton fabric with an outer layer of polyurethane coated woven nylon fabric are classified in subheading 6307.90.9889, HTSUSA. Subheading 6307.90.9889, HTSUSA, provides for:

6307	Other made up articles, including dress patterns:			
6307.90		Other:		
			Other:	
6307.90.98				Other,
				Other:
6307.90.9889					Other.

Holding:

New York Ruling Letter C81609 (Nov. 19, 1997) is revoked.

The Zeotrope Holdings, Ltd. nursing pads composed entirely of woven cotton fabric and composed of woven cotton fabric with an outer layer of polyurethane coated woven nylon fabric are classified in subheading 6307.90.9889, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty for subheading 6307.90.9889, HTSUSA, is seven (7) percent, *ad valorem*.

The legal reasoning and analysis of Headquarters Ruling Letter 965711 (July 24, 2002) is incorporated by reference. Headquarters Ruling Letter 965711 is attached to and made a part of this ruling letter.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964387 jsj
Category: Classification
Tariff No. 6307.90.9889

MR. OWEN HAIRSINE
ZEOTROPE HOLDINGS, LTD.
12993 80th Avenue
Surrey, British Columbia
Canada V3W 3B1

Re: Reconsideration and Modification of HQ 961238 (April 21, 1998); Nursing Pads; Breast Pads; Country of Origin; Woven Absorbent Material; Subheading 6307.90.9889, HTSUSA; NY C81609 (Nov. 19, 1997) Modified by HQ 961238 and Revoked by HQ 965750; HQ 965711 (July 24, 2002).

DEAR MR. HAIRSINE:

The purpose of this correspondence is to advise you that the Customs Service has reconsidered Headquarters Ruling Letter 961238 (April 21, 1998).

The Customs Service in Headquarters Ruling Letter 961238 stated that nursing pads composed entirely of woven cotton fabric and nursing pads composed of woven cotton fabric with an outer layer of nylon fabric were classified in subheading 6217.10.9510, HTSUSA. Headquarters Ruling Letter 961238, based on the articles being classified in heading 6217, HTSUS, held that the nursing pads were not entitled to preferential tariff treatment pursuant to the North American Free Trade Agreement (NAFTA) and that their country of origin was Canada.

The Customs Service has reviewed the classification ruling in NY C81609, classifying the nursing pads in subheading 6217.10.9510, HTSUSA, and determined that it is not correct. New York Ruling Letter C81609 is being revoked by HQ 965750 pursuant to the analysis set forth in HQ 965711 (July 24, 2002).

The Customs Service in this ruling letter is modifying HQ 961238. The conclusion concerning the NAFTA preferential tariff treatment eligibility determination is correct, although the reasoning based on the classification ruling is not accurate. Since the conclusion is correct, that the merchandise is not eligible for NAFTA preferential tariff treatment, that aspect of HQ 961238 will not be disturbed.

The Customs Service in this ruling letter is modifying that aspect of HQ 961238 that addressed the country of origin determinations. Headquarters Ruling Letter 961238, based on the merchandise being classified in subheading 6217.10.9510, HTSUSA, ruled that the country of origin of the merchandise was Canada. It is Customs decision in this ruling letter that the country of origin is not Canada. The reasoning and analysis addressing Customs decision concerning the correct country of origin is set forth in this letter.

Facts:

The articles in issue are two styles of nursing pads.

Style one is composed solely of 100 percent woven cotton fabric. The fabric is cut into three pieces with triangular shapes and three pieces in the shape of a half-moon.

Style two is identical to style one, with the exception that it has a woven nylon fabric with a polyurethane coating on one side of the article. It is Customs understanding that the woven cotton fabric provides the article with its absorbent capability.

The woven cotton fabric for both styles of nursing pads is formed in China. The woven nylon fabric with a polyurethane coating is formed and coated in the United States. The cotton and nylon fabrics are cut, joined and edge sewn in Canada.

Issue:

What is the country of origin of above-described nursing pad, identified by the Customs Service as style one, which is composed entirely of woven cotton fabric formed in China and cut, joined together and edge-sewn in Canada?

What is the country of origin of above-described nursing pad, identified by the Customs Service as style two, which is composed of woven cotton fabric formed in China, woven nylon fabric with a polyurethane coating formed in the United States and then cut, joined together and edge-sewn in Canada?

Law and Analysis

Classification

The Customs Service in Headquarters Ruling Letter 965711 (July 24, 2002) provided classification analysis, at the heading level for heading 6307, HTSUS, for nursing pads substantially similar to those in this ruling letter composed entirely of woven cotton fabric and nursing pads composed of woven cotton fabric with an outer layer of nylon fabric. Heading 6307, HTSUS, a residual or basket provision, provides for the classification of "[o]ther made up articles, including dress patterns."

The legal reasoning and analysis addressing the classification, at the heading level, in heading 6307, HTSUS, of substantially similar nursing pads set forth in HQ 965711 is incorporated into this ruling letter by reference. Headquarters Ruling Letter 965711 is attached to and made a part of this ruling letter.

The classification of Zeotrope Holding's nursing pads, composed entirely of woven cotton fabric and those composed of woven cotton fabric with an outer layer of nylon fabric are classified in proposed Headquarters Ruling Letter 965750 in subheading 6307.90.9889, HTSUSA. Subheading 6307.90.9889, HTSUSA, provides for:

6307	Other made up articles, including dress patterns:
6307.90	Other:
	Other:
6307.90.98	Other,
	Other:
6307.90.9889	Other.

Country of Origin

Nursing Pads Composed Entirely of Woven Cotton Fabric Formed in China and Assembled in Canada

The Uruguay Round Agreements Act, particularly section 334, codified at 19 U.S.C. 3592, sets forth the rules of origin for textile and apparel products. Customs, pursuant to the legislative authority extended to the Secretary of the Treasury, published regulations implementing the principles set forth by Congress.

Section 102.21 of Customs regulations establishes, with specifically delineated exceptions, that "this section shall control the determination of the country of origin of imported textile and apparel products for purposes of the Customs laws." 19 C.F.R. 102.21. Textile and apparel products that are encompassed within the scope of section 102.21 are any goods classifiable in Chapters 50 through 63 of the HTSUSA, as well as goods classifiable under other specifically enunciated subheadings that include subheading 6307.90, HTSUS. *See* 19 C.F.R. 102.21 (b)(5).

The nursing pad, identified as style one, is classified in subheading 6307.90.9889, HTSUSA. The nursing pads are, therefore, considered "textile products" for the purposes of section 102.21 country of origin determinations. 19 C.F.R. 102.21 (b)(5).

The country of origin of textile and apparel products is determined by the sequential application of paragraphs (c)(1) through (c)(5) of section 102.21. Paragraph (c)(1) provides that "[t]he country of origin of a textile or apparel product is the single country, territory or insular possession in which the good was wholly obtained or produced." Since the fabric of which the nursing pad is composed is formed in China and then cut, joined and edge-sewn in Canada, the origin of the assembled nursing pad cannot be determined by reference to paragraph (c)(1).

Paragraph (c)(2) of section 102.21 provides that where the country of origin cannot be determined according to paragraph (c)(1), resort should next be to paragraph (c)(2). The country of origin, according to paragraph (c)(2), is "the single country, territory or insular possession in which each foreign material incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e)" of section 102.21. Paragraph (e), as applicable to the instant determination, establishes a tariff shift rule that provides "The country of origin of a good classifiable under subheading 6307.90 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process." Section 102.21 (b)(2) defines "fabric-making process" to mean "any manufacturing operation that begins with polymers, fibers, filaments (including strips), yarns, twine, cordage, rope, or strips and results in a textile fabric." 19 C.F.R. 102.21 (b)(2).

Paragraph (c)(2) confers the country of origin of the style one nursing pad. The country of origin of the assembled nursing pad is China because the "fabric comprising the good was formed by a fabric-making process" in China. 19 C.F.R. 102.21 (c)(2).

Nursing Pads Composed of Woven Cotton Fabric Formed in China, Nylon Woven Fabric With a Polyurethane Coating Formed in the United States and Assembled in Canada

Commencing the country of origin determination of the style two nursing pad, composed of woven cotton fabric formed in China, woven nylon fabric with a polyurethane coating formed in the United States and assembled in Canada, the Customs Service again referenced section 102.21 of Customs Regulations. Paragraph (c)(1), for the reasons assigned in the origin analysis of the style one nursing pad, does not confer the origin of the style two nursing pad.

Paragraph (c)(2) also fails to confer origin. Paragraph (e), as addressed above and as applicable pursuant to paragraph (c)(2), establishes a tariff shift rule for articles classified in subheading 6307.90, HTSUS. The rule references "*the country* in which the fabric comprising the good was formed by a fabric-making process." (Emphasis added). The style two nursing pad is comprised of fabrics formed in two countries, the United States and China, precluding the application of paragraph (c)(2).

Paragraph (3) of section 102.21, to which resort must be had since neither paragraphs (c)(1) nor (c)(2) determine the origin of the nursing pad, addresses knit to shape goods and goods that are not knit to shape, but which are wholly assembled in a single country, territory or insular possession. *See* 19 C.F.R. 102.21 (c)(3). Paragraph (3) does not confer origin for two reasons. The Zeotrope nursing pad is not a knit to shape good as addressed in subparagraph (c)(3)(i) and, although the nursing pad is assembled entirely in Canada, subparagraph (c)(3)(ii) excepts goods classified in subheading 6307.90, HTSUS, from its application. Customs must now examine paragraph (c)(4) of section 102.21.

Paragraph (c)(4) of section 102.21 provides:

> Where the country of origin of a textile or apparel product cannot be determined under paragraph (c) (1), (2) or (3) of this section, the country of origin of the good is the single country, territory, or insular possession in which the most important assembly or manufacturing process occurred.

It is the determination of this office that section 102.21 (c)(4) confers origin on the style two Zeotrope nursing pad. The "most important assembly or manufacturing process" in the manufacture of the style two Zeotrope nursing pad occurs in China. 19 C.F.R. 102.21 (c)(4).

The woven cotton fabric manufactured in China is the most important part of the style two nursing pad. This aspect of the style two nursing pad is capable of functioning as a complete nursing pad, as is reflected by the fact that the style one nursing pad only consists of woven cotton fabric. The coated nylon fabric made in the United States provides the style two nursing pad with an added feature, a moisture-resistant barrier, not available in the style one nursing pad, but it is not essential to the functioning of the article.

It is additionally the determination of the Custom Service that the cutting, joining and sewing that occurs in Canada is outweighed in importance by the cotton fabric-making process that occurs in China. This position, resting the country of origin determination on the fabric-making process, rather than the assembly process, carries out the intent and purpose of Congress in the enactment of textile and apparel rules of origin in section 334 of the Uruguay Round Agreements Act. *See* HQ 958972 (April 9, 1996).

Holding:

Headquarters Ruling Letter 961238 (April 21, 1998) is modified.

The country of origin of the style one Zeotrope Holdings, Ltd. nursing pad, composed entirely of woven cotton fabric formed in China that is cut, joined together and edge-sewn in Canada, is China.

The country of origin of the style two Zeotrope Holdings, Ltd. nursing pad, composed of woven cotton fabric formed in China, woven nylon fabric with a polyurethane coating formed in the United States and that is cut, joined together and edge-sewn in Canada, is China.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF NURSING PADS WITH ABSORBENT NONWOVEN FABRIC

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letters and revocation of treatment relating to the classification of nursing pads manufactured with absorbent nonwoven fabric.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of nursing pads manufactured with absorbent nonwoven fabric. Customs also proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before September 13, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at: U.S. Customs Service, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202): 572–8768.

FOR FURTHER INFORMATION CONTACT: J. Steven Jarreau, Textiles Classification Branch: (202) 572–8817

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both

the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, 19 U.S.C. 1484, the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke two ruling letters relating to the tariff classification of nursing pads manufactured with absorbent nonwoven fabric.

Although in this notice Customs is specifically referring to one New York Ruling Letter and one Headquarters Ruling Letter, this notice covers any rulings on this merchandise that may exist, but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, an internal advice memorandum or decision or a protest review decision) on the merchandise subject to this notice, which classified the merchandise contrary to this notice, should advise Customs during this comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)) as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importers or their agents for importation of merchandise subsequent to the effective date of the final decision on this notice.

The Customs Service in New York Ruling Letter D82853 classified nursing pads with an initial layer of knit fabric, a second layer of a nonwoven fabric, a third layer, which provides the article with its absorbent capability, of a nonwoven polyester fabric and a fourth layer of a woven fabric in subheading 6217.10.9510, HTSUSA. New York Ruling Letter D82853 is set forth as "Attachment A" to this document.

It is now Customs determination that nursing pads with a knit component, nonwoven components and a woven component, in which the absorbent capability is provided by one of the nonwoven components, are properly classified in subheading 6307.90.9889, HTSUSA. Proposed

Headquarters Ruling Letter 963826, revoking NY D82853, is set forth as "Attachment B" to this document.

The Customs Service in Headquarters Ruling Letter 963488 classified nursing pads with an outer layer of a nonwoven fabric, a second outer layer of a woven fabric and an absorbent inner layer of a nonwoven polyester and rayon fabric in subheading 6217.10.9510, HTSUSA. Headquarters Ruling Letter 963488 is set forth as "Attachment C" to this document.

It is now Customs determination that nursing pads with an outer layer of a nonwoven fabric, a second outer layer of a woven fabric and an absorbent inner layer of a nonwoven polyester and rayon fabric are properly classified in subheading 6307.90.9889, HTSUSA. Proposed Headquarters Ruling Letter 964388, revoking HQ 963488, is set forth as "Attachment D" to this document.

The legal reasoning and analysis set forth in HQ 965711 (July 24, 2002) is incorporated into and made a part of proposed HQ 963826 and HQ 964388. Headquarters ruling letter 965711 is set forth as "Attachment E" to this document.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY D82853 and HQ 963488 and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 965711 (July 24, 2002), which is incorporated by reference in proposed HQ 963826 and HQ 964388. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 30, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 16, 1998.

CLA-2-62:RR:NC:3:353 D82853
Category: Classification
Tariff No. 6217.10.9510

MS. CARLA CRAVALHO
HELLMANN INTERNATIONAL FORWARDERS, INC.
448 Grandview Drive
South San Francisco, CA 94080

Re: The tariff classification of a washable breast pad from China.

DEAR MS. CRAVALHO:

In your letter dated September 25, 1998, on behalf of Mantex Trading, Inc., you requested a classification ruling.

The submitted sample is a washable breast pad that is used to prevent leakage of breast milk in breast feeding mothers. The item is made of four layers of fabric consisting of an outer layer of 100% nylon lace fabric, a woven 100% polyester fabric lining, 100% polyester fabric padding and a bottom layer of woven 100% cotton flannel fabric.

General Rule of Interpretation (GRI) 3(b) states that "Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

In the instant case the item's purpose is to keep bras and garments dry by absorbing breast milk. The portion of the breast pad that touches the skin and allows for absorption, that is the bottom layer of cotton fabric, gives the item its essential character.

The applicable subheading for the washable breast pad will be 6217.10.9510, Harmonized Tariff Schedule of the United States (HTS), which provides for "Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other * * * Of cotton." The duty rate will be 15.1% ad valorem.

The washable breast pad falls within textile category designation 359. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth Reidlinger at 212-466-5881.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 963826 jsj
Category: Classification
Tariff No. 6307.90.9889

MS. CARLA CRAVALHO
HELLMANN INTERNATIONAL FORWARDERS, INC.
448 Grandview Drive
South San Francisco, CA 94080

Re: Reconsideration and Revocation of NY D82853 (Oct. 16, 1998); Nursing Pads; Breast Pads; Nonwoven Absorbent Material; Subheading 6307.90.9889, HTSUSA; HQ 965711 (July 24, 2002) Incorporated by Reference.

DEAR MS. CRAVALHO:

The purpose of this correspondence is to advise you that the Customs Service has reconsidered NY D82853 (Oct. 16, 1998) issued to you on the behalf of your client, Mantex Trading, Inc.

The Customs Service in New York Ruling Letter D82853 classified nursing pads with an initial layer of knit fabric, a second layer of a nonwoven fabric, a third layer, which provides the article with its absorbent capability, of a nonwoven polyester fabric and a fourth layer of a woven fabric in subheading 6217.10.9510, HTSUSA. The Customs Service has reviewed NY D82853 and determined that it is not correct.

Customs is revoking NY D82853 and reclassifying nursing pads with a knit component, nonwoven components and a woven component, in which the absorbent capability is provided by one of the nonwoven components, in subheading 6307.90.9889, HTSUSA. The reasoning and analysis addressing Customs decision is provided in this ruling letter and HQ 965711 (July 24, 2002) which is incorporated by reference.

Facts:

The article in issue, identified as a nursing pad, is designed to be placed in the brassiere of nursing mothers to absorb excess milk. Mantex's nursing pad is circular, four and one-fourth (4 ¼) inches in diameter and composed of four layers.

The initial layer, which will come into contact with the brassiere, is composed of 100 percent nylon lace. The second layer is a 100 percent nonwoven polyester fabric lining. The third layer, which affords the article its absorbent capability, is composed of 100 percent nonwoven polyester fabric. The fourth and final layer, which will come into contact with the wearer's skin, is composed of 100 percent woven cotton flannel fabric.

The Customs Service specifically notes that the nonwoven polyester fabric that affords the nursing pad its absorbent capability is not wadding.

The Customs Service is advised that the country of manufacture is China.

Issue:

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described nursing pad with a knit component, nonwoven components and a woven component, in which the absorbent capability is provided by one of the nonwoven components?

Law and Analysis:

The Customs Service in Headquarters Ruling Letter 965711 (July 24, 2002) provided classification analysis, at the heading level, for a substantially similar nursing pad. Customs, in HQ 965711, discussed the classification of a nursing pad with an absorbent nonwoven fabric component and concluded that it should be classified in heading 6307, HTSUS. Heading 6307, HTSUS, a residual or basket provision, provides for the classification of "[o]ther made up articles, including dress patterns."

The legal reasoning and analysis addressing the classification, at the heading level, in heading 6307, HTSUS, of a nursing pad with multiple components, in which the absorbent capability is provided by a nonwoven component, set forth in HQ 965711 is incorporated into this ruling letter by reference. Headquarters Ruling Letter 965711 is attached to and made a part of this ruling letter.

The Customs Service is cognizant that HQ 965711 did not address the classification of nursing pads with knit textile fabric components. The reasoning applied in HQ 965711 regarding nursing pads with woven and nonwoven textile fabric components in which those components do not provide the nursing pads with their absorbent capability is, however, equally analogous.

Continuing the classification of the Mantex nursing pad, at the subheading level, Mantex's nursing pad with a knit component, nonwoven components and a woven component, in which the absorbent capability is provided by one of the nonwoven components, is classified in subheading 6307.90.9889, HTSUSA. Subheading 6307.90.9889, HTSUSA, provides for:

6307	Other made up articles, including dress patterns:
6307.90	Other:
	Other:
6307.90.98	Other,
	Other:
6307.90.9889	Other.

Holding:

The Mantex Trading, Inc. nursing pad with a knit component, nonwoven components and a woven component, in which the absorbent capability is provided by one of the nonwoven components, is classified in subheading 6307.90.9889, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty for subheading 6307.90.9889, HTSUSA, is seven (7) percent, *ad valorem*.

The legal reasoning and analysis of Headquarters Ruling Letter 965711 (July 24, 2002) is incorporated by reference. Headquarters Ruling Letter 965711 is attached to and made a part of this ruling letter.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 2, 2000.

CLA–2 RR:CR:TE 963488 jb
Category: Classification
Tariff No. 6217.10.9530

MS. JOANNA CHEUNG
HONG KONG ECONOMIC AND TRADE OFFICE
1520 18th Street, N.W.
Washington, DC 20036

Re: Classification of nursing pads.

DEAR MS. CHEUNG:

This is in response to a letter, dated November 5, 1999, from Ms. Fiona Chau, on behalf of Gerber Products Company, regarding the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of nursing pads. A sample was submitted to this office for review.

Facts:

The submitted sample consists of a nursing pad which is round in shape and measures approximately 4 inches in diameter. The composition of the nursing pad is as follows: the front consists of a nonwoven 100 percent polypropylene fabric, the back consists of a woven 100 percent cotton fabric and the center is filled with wadding. All three layers are sewn together with overlock stitching.

You state that the importer attempted entry for this merchandise with a category 669 (non-apparel) visa and was denied by Customs in Chicago which required a 659 (clothing accessory) visa for this merchandise. You ask that this office review the classification of this merchandise and find that the proper classification for this merchandise is as a non-apparel item.

Issue:

What is the proper classification for the subject merchandise?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied, in the order of their appearance.

First, we would like to emphasize that classification of merchandise in the HTSUS is based on the terms of the headings and not on a comparison of statistical suffixes and textile quota categories. Accordingly, any comparison that is executed is between the competing headings, based on the terms of the headings and any applicable section or chapter notes.

Customs, in requesting a 659 visa for this merchandise, believes the subject merchandise to be a clothing accessory of heading 6217, HTSUS. You however, appear to believe that this merchandise is best described as an article of wadding, classified in heading 5601, HTSUS, with corresponding quota category 669. We note that similar merchandise has been the subject of past Customs rulings which have held that the merchandise is classified in heading 6307, HTSUS, which provides for other made up textile articles. This office is currently in the process of reviewing those rulings.

Heading 6217, HTSUS, provides for, other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212. It has been Customs position that clothing accessories bear some relation to clothing, are intended for use with clothing and are of secondary importance to clothing. Additionally, accessories have been viewed by Customs as articles of secondary or subordinate importance or items not in themselves essential, but adding to the beauty, convenience or effectiveness of something else. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) to heading 6217, HTSUS, state, in part, that the heading covers inter alia:

> (1) Dress shields, usually of rubberised fabric or of rubber covered with textile material. Dress shields wholly of plastics or of rubber are excluded (headings 39.26 and 40.15 respectively).
>
> (2) Shoulder or other pads. They are usually made of wadding, felt, or textile waste covered with textile fabric. Shoulder and other pads consisting of rubber (usually cellular rubber) not covered with textile material are excluded (heading 40.15).

Heading 5601, HTSUS, provides for, among other things, articles of wadding. The EN to this heading state, in part, that this heading also covers wadding in the piece or cut to length, and articles of wadding other than those covered more specifically by other headings of the Nomenclature. Among the articles of wadding listed as not being classified under this heading are clothing pads of heading 6117 or 6217.

In the case of the subject merchandise, heading 6217 and heading 5601, HTSUS, both appear to describe the subject merchandise. As such, we turn to GRI 3 for guidance, which states:

> When, by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Based on GRI 3(a), and a review of this merchandise, it is our view that the subject merchandise is more specifically described as an other madeup clothing accessory and not an article of wadding; the latter which is descriptive of almost anything which might include wadding. We find further support for classification of this merchandise as clothing accessories in the EN to both heading 6217 and 5601, HTSUS. The submitted nursing pads are akin to the dress shields and other "pads" enumerated in the EN to heading 6217. Similar to the dress shields, the nursing pads at issue provide protection against moisture (leakage) and personal comfort. Additionally, as explicitly stated in the EN to heading 5601, HTSUS, clothing pads are precluded from classification in that heading. We see no difference between the nursing pads at issue, which are used in conjunction with women's clothing, and the "clothing pads" excluded from heading 5601, HTSUS. Furthermore, the classification of nursing pads as accessories to garments of heading 6217, is consistent with Customs position that these articles, although not in themselves essential, add to the beauty, convenience or effectiveness of the primary garments with which they will be worn.

However, as the nursing pads are composed of different fabrics, we must turn to GRI 3 for a proper classification determination at the subheading level.

The subject nursing pads are composed of a nonwoven polypropylene fabric, cotton fabric and wadding. As no one heading accurately describes the subject merchandise, that is, only referring in part to the composition of the nursing pads, a determination cannot be made pursuant to GRI 3(a). Similarly, a determination cannot readily be made pursuant to a GRI 3(b), essential character. All three fabrics contribute equally to the efficacy of these articles. The cotton fabric, the side of the pad which will face the wearer's skin, is necessary for purposes of comfort, to ensure that an already sensitive area will not be further abraded. The wadding is also important for reasons of moisture absorption. Finally, the role of the nonwoven polypropylene backing, which will face the garment, is also important in terms of providing an additional barrier between the moisture absorbed by the wadding and the garment. As such, the classification of this merchandise is pursuant to GRI 3(c), the heading which occurs last in numerical order. Accordingly, the nursing pads are classifiable as either "of cotton" or "of man-made fibers" depending upon the fabric which determines the classification. As the subheading for "of man-made fibers" appears after that of "of cotton" in the tariff, the nursing pads are classified in subheading 6217.10.9530, HTSUSA.

For purposes of clarification, we note that we are precluded from classifying the subject merchandise in heading 6307, HTSUS, a basket provision for textile articles which are not elsewhere more specifically provided for under the tariff, because heading 6217, HTSUS, specifically describes the subject merchandise.

Holding:

The subject nursing pads are classified in subheading 6217.10.9530, HTSUSA, which provides for, other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: other: other: of man-made fibers. The applicable general column one rate of duty is 15 percent ad valorem and the quota category is 659.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest the consignee check, close to the time of shipment, the Status on Current Import Quotas (Restraint Levels), an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, the consignee should contact the local Customs office prior to importing the merchandise to determine the current applicability of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964388 jsj
Category: Classification
Tariff No. 6307.90.9889

MR. JAMES L. SAWYER
KATTEN MUCHIN ZAVIS
525 West Monroe Street
Suite 1600
Chicago, IL 60661–3693

Re: Reconsideration and Revocation of HQ 963488 (May 2, 2000); Nursing Pads; Breast Pads; Nonwoven Absorbent Material; Subheading 6307.90.9889, HTSUSA; HQ 965711 (July 24, 2002) Incorporated by Reference.

DEAR MR. SAWYER:

The purpose of this correspondence is to respond to your request dated August 17, 2001. The correspondence in issue requested, on the behalf of your client, Gerber Products Company (Gerber), reconsideration of HQ 963488 (May 2, 2000).

This reconsideration is being issued subsequent to the following: (1) A review of your submission dated August 17, 2001; (2) An examination of the sample nursing pad in issue in HQ 963488; and (3) A meeting conducted at Customs Headquarters on December 19, 2001, between a member of my staff and counsel for Gerber.

The Customs Service has reviewed HQ 963488 in which Gerber's nursing pad was classified in subheading 6217.10.9530, HTSUSA. It is Customs determination that HQ 963488 is not correct. Customs is revoking HQ 963488 and reclassifying the Gerber nursing pad.

Gerber's nursing pad, in which the absorbent capability is provided by a nonwoven polyester and rayon fabric, is properly classified in subheading 6307.90.9889, HTSUSA. The reasoning and analysis addressing this change is provided in this ruling letter and in HQ 965711, which is incorporated by reference.

Facts:

The article in issue, identified as a nursing pad, is designed to be placed in the brassiere of nursing mothers to absorb excess milk. Gerber's nursing pad is circular, four (4) inches in diameter and composed of three layers. The initial layer, which will come into contact with the brassiere, is composed of a nonwoven 100 percent polypropylene fabric. The middle layer, which affords the article its absorbent quality, is composed of a nonwoven polyester and rayon fabric. The third layer, which will come into contact with the wearer's skin, is composed of 100 percent woven cotton fabric.

The Customs Service specifically notes that the nonwoven polyester and rayon fabric is not wadding.

The Customs Service is advised that the country of manufacture is Hong Kong.

Issue:

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described nursing pad which has two outer layers, one of a nonwoven fabric and the other of a woven fabric, and an inner absorbent layer composed of a nonwoven polyester and rayon fabric?

Law and Analysis:

The Customs Service in Headquarters Ruling Letter 965711 (July 24, 2002) provided classification analysis, at the heading level, for a substantially similar nursing pad. Customs, in HQ 965711, discussed the classification of a nursing pad with woven and nonwoven fabric components, in which the absorbent capability is provided by a nonwoven fabric component, and concluded that it should be classified in heading 6307, HTSUS. Heading 6307, HTSUS, a residual or basket provision, provides for the classification of "[o]ther made up articles, including dress patterns."

The legal reasoning and analysis addressing the classification, at the heading level, in heading 6307, HTSUS, of a nursing pad for which the absorbent capability is provided by a

nonwoven fabric and the outer layers are of woven and/or nonwoven fabrics, set forth in HQ 965711 is incorporated into this ruling letter by reference. Headquarters Ruling Letter 965711 is attached to and made a part of this ruling letter.

Continuing the classification of Gerber's nursing pad, at the subheading level, Gerber's nursing pad, for which the absorbent capability is provided by a nonwoven fabric and the outer layers are a woven fabric and a nonwoven fabric, is classified in subheading 6307.90.9889, HTSUSA. Subheading 6307.90.9889, HTSUSA, provides for:

6307	Other made up articles, including dress patterns:			
6307.90		Other:		
			Other:	
6307.90.98				Other,
				Other:
6307.90.9889					Other.

Holding:

Headquarters Ruling Letter 963488 (May 2, 2000) has been reconsidered and is revoked.

The Gerber nursing pads for which the absorbent capability is provided by an inner layer of a nonwoven fabric and the outer layers are a woven fabric and a nonwoven fabric are classified in subheading 6307.90.9889, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty for subheading 6307.90.9889, HTSUSA, is seven (7) percent, *ad valorem*.

The legal reasoning and analysis of Headquarters Ruling Letter 965711 (July 24, 2002) is incorporated by reference. Headquarters Ruling Letter 965711 is attached to and made a part of this ruling letter.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 24, 2002.

CLA–2 RR:CR:TE 965711 jsj
Category: Classification
Tariff No. 6307.90.9889

MS. ESTELLE LEE
PRESIDENT, TL CARE
P.O. Box 77087
San Francisco, CA 94107

Re: Nursing Pads; Breast Pads; Paper Absorbent Component; Textile Wadding Absorbent Component; Woven Textile Fabric Absorbent Component; Nonwoven Textile Fabric, But Not Wadding Absorbent Component; General Rules of Interpretation 1 and 3(b); Essential Character; Headings 4818, 5601 and 6307, HTSUS; Not Clothing Accessories, Heading 6217, HTSUS; Woven Cotton Absorbent Component; Subheading 6307.90.9889, HTSUSA.

DEAR MS. LEE:

The purpose of this correspondence is to respond to your request dated April 25, 2002. The correspondence in issue requested a binding classification ruling of the merchandise described as a "nursing pad."

This ruling is being issued subsequent to the following: (1) A review of your submission dated April 25, 2002; and (2) An examination of the sample that accompanied your ruling request.

Facts:

The article in issue, identified as a nursing pad, is designed to be placed in the brassiere of nursing mothers to absorb excess milk. It is circular or slightly conical in shape and measures five (5) inches in diameter. The nursing pad is composed entirely of four (4) layers of 100 percent woven cotton fabric stated to be flannel. No other materials form a part of this article. The circumference is sewn.

This merchandise is also commonly referred to as "breast pads." The Customs Service, for convenience purposes, will refer to this item as a nursing pad.

The Customs Service is advised that the country of manufacture is China.

Issue:

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described nursing pad composed entirely of woven cotton fabric[1]?

Law and Analysis:

The federal agency responsible for initially interpreting and applying the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is the U.S. Customs Service.[2] The Customs Service, in accordance with its legislative mandate, classifies imported merchandise pursuant to the General Rules of Interpretation (GRI) and the Additional U.S. Rules of Interpretation.[3]

General Rule of Interpretation 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." *General Rule of Interpretation 1*. General Rule of Interpretation 1 further states that merchandise which cannot be classified in accordance with the dictates of GRI 1 should be classified pursuant to the other General Rules of Interpretation, provided the HTSUSA chapter headings or notes do not require otherwise. According to the Explanatory Notes (EN), the phrase in GRI 1, "provided such headings or notes do not otherwise require," is intended to "make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount." *General Rules for the Interpretation of the Harmonized System, Rule 1, Explanatory Note (V).*

The Explanatory Notes constitute the official interpretation of the Harmonized System at the international level. *See* Joint Explanatory Statement *supra* note 2, at 549. The Explanatory Notes, although neither legally binding nor dispositive of classification issues, do provide commentary on the scope of each heading of the HTSUS. The EN's are generally indicative of the proper interpretation of the headings. *See* T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989); *Lonza, Inc. v. United States*, 46 F. 3rd 1098, 1109 (Fed. Cir. 1995).

The Customs Service, observing the dictates of GRI 1, to classify merchandise according to the terms of the headings and the section and chapter notes, has encountered significant difficulty in the classification of nursing pads. Nursing pads, as previously explained, are items used by nursing mothers to absorb excess breast milk during lactation. Nursing pads may be used for other purposes, but it is Customs conclusion that any use of nursing pads other than by nursing mothers to absorb excess milk is fugitive.

The difficulty encountered by Customs in classifying this merchandise stems from two facts: (1) Nursing pads are not designated *eo nomine* in the tariff schedule; and (2) The manufacturers of nursing pads utilize different materials, primarily different absorbent material, to construct their products. Customs commenced the classification of this merchandise with this understanding.

Customs survey of nursing pads indicates that they are manufactured utilizing primarily four types of absorbent material: (1) Paper and/or paper pulp; (2) Textile wadding; (3) Woven textile fabrics; and (4) Nonwoven textile fabrics that are not wadding. It is not Customs intention to suggest that this list is exclusive. Other absorbent materials may be used in the manufacture of nursing pads either presently or in the future. The four prima-

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[1] All aspects of this article are composed of woven cotton fabric, including the absorbent layer.

[2] *See* 19 U.S.C. 1500 (West 1999) (providing that the Customs Service is responsible for fixing the final appraisement, classification and amount of duty to be paid); *See also* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 100–576, at 549 (1988) *reprinted in* 1988 U.S. Code Cong. and Adm. News 1547, 1582 [hereinafter Joint Explanatory Statement].

[3] *See* 19 U.S. C. 1202 (West 1999); *See generally, What Every Member of The Trade Community Should Know About: Tariff Classification*, an Informed Compliance Publication of the Customs Service available on the World Wide Web site of the Customs Service at www.customs.gov, search "Importing & Exporting" and then "U.S. Customs Informed Compliance Publications."

ry types of absorbent material addressed above, for the purposes of this ruling letter, are not in composition with any type of super absorbent chemical compound.

Since the tariff schedule does not designate nursing pads, *eo nomine*, that is by name, in any of the headings, Customs has determined that it is not possible to classify all nursing pads in a single heading. Failing to confirm a single heading into which all nursing pads may be properly classified, Customs re-examined the GRI's, gave careful thought to the ruling requests and protests currently pending in the Office of Regulations and Rulings and reviewed the classification history of this line of merchandise. The decision was made, pursuant to the requirements of the GRI's, to classify each article on its own merits.

The Customs Service, pursuant to the principles of "informed compliance" and "shared responsibilities" set forth in the Customs Modernization Act,[4] has determined that in order for the trade community to understand Customs reasoning, it is important to address in this ruling letter Customs thought process with regards to the classification of nursing pads. It is Customs judgment because of the different ways in which different types of nursing pads are manufactured that providing comprehensive analysis of the classification of the different types of nursing pads will result in a more uniform and correct classification of this merchandise.

Simply addressing TL Care's nursing pad would meet Customs legal obligation, but that would only inform Customs field personnel and the trade of the classification of one type of nursing pad. Only a complete and thorough discussion of the classification of the different types of nursing pads can result in the uniformity sought by Customs and the accurate classification of merchandise required of the trade.

The Customs Service will initially provide analysis of the headings that the agency has concluded are relevant to the classification of nursing pads. This ruling letter will conclude with the classification of the TL Care nursing pad.

It is the understanding of the Customs Service, as previously stated, that there are four primary types of nursing pads based on absorbent properties. The primary types of nursing pads include those with the following types of absorbent material: (1) Paper; (2) Textile wadding; (3) Woven textile fabrics; and (4) Nonwoven textile fabrics that are not wadding. Customs will address the classification, at the heading level, of nursing pads with each of these absorbent materials.

It is important to note that nursing pads are generally not composed entirely of the same material that provides the nursing pad with its absorbent capability. Although Customs focus, as will be addressed subsequently, will be on the material or substance that provides a nursing pad with its absorbent capability, proper application of the GRI's mandate that Customs not ignore the other materials or substances which make-up a particular style of nursing pads.

Nursing Pads of Heading 4818

Nursing Pads Composed Entirely of Materials Enumerated in Heading 4818

Commencing the classification of nursing pads composed entirely of paper pulp, paper, cellulose wadding or webs of cellulose fibers, these nursing pads, in accordance with the dictates of GRI 1, are classified according to the terms of heading 4818, HTSUS. Heading 4818, HTSUS, provides for the classification of:

Toilet paper and similar paper * * * of a kind used for household or sanitary purposes; * * * *diapers, tampons, bed sheets and similar household, sanitary or hospital articles*, articles of apparel and clothing accessories, of paper pulp, paper, cellulose wadding or webs of cellulose fibers. (Emphasis added).

Explanatory Note 48.18 provides that heading 4818, HTSUS, addresses the classification of "household, sanitary or other hospital articles * * * of paper pulp, paper, cellulose wadding or webs of cellulose fibres." *Explanatory Note 44.18*. Sanitary articles, in accordance with the definition of "sanitary" in Webster's New Collegiate Dictionary are articles "of or relating to health." *Webster's New Collegiate Dictionary*, G. & C. Merriam Company (1977). It is the judgment of this office that nursing pads, designed to absorb excess milk from nursing mothers, are sanitary articles for the purposes of the tariff schedule and are

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[4] *See generally* North American Free Trade Implementation Act, Pub. L. 103-183, 107 Stat. 2057 (1993); *See also* Customs Modernization and Informed Compliance Act: Hearing on H.R. 3935 Before the House Comm. on Ways and Means, Subcomm. On Trade, 102nd Cong. 91 (1992) (statement of Carol Hallett, Commissioner, U. S. Customs Service) "Customs must do a better job of informing the trade community of how Customs does business; and the trade community must do a better job to assure compliance with U. S. trade laws."

similar to diapers and tampons, the sanitary articles designated *eo nomine* in heading 4818, HTSUS.

It is, therefore, Customs determination that nursing pads composed entirely of paper pulp, paper, cellulose wadding or webs of cellulose fibers are properly classified, pursuant to GRI 1, in heading 4818, HTSUS.

Nursing Pads With Components of Paper Pulp, Paper, Cellulose Wadding or Webs of Cellulose Fibers and of Textile Fabrics

Nursing pads for which the absorbent capability is provided by paper pulp, paper, cellulose wadding or webs of cellulose fibers, but which are not composed entirely of the materials enumerated in heading 4818, may not be classified pursuant to GRI 1 in heading 4818, HTSUS. These nursing pads generally have an absorbent inner layer or layers composed of paper pulp, paper, cellulose wadding or webs of cellulose fibers, but the outer layer or layers, those layers not primarily designed and intended to provide the article with its absorbent property, may generally be composed of one or more textile fabrics. The outer layer or layers may be, among other fabrics, lace, nonwoven fabrics or woven fabrics.

Nursing pads with an outer component of a textile fabric or fabrics and with an inner absorbent component of paper pulp, paper, cellulose wadding or webs of cellulose fibers may not be classified pursuant to GRI 1. A review of the terms of the headings of the HTSUS and the relevant section and chapter notes does not establish a heading into which an article of this nature may be properly classified, pursuant to GRI 1.

Having determined that General Rule of Interpretation 1 does not resolve this classification matter, the Customs Service reviewed GRI 2. Since nursing pads composed of an outer component of textile fabrics and with an inner absorbent component of the materials enumerated in heading 4818, HTSUS, that is, paper pulp, paper, cellulose wadding or webs of cellulose fibers, are not incomplete, unfinished, unassembled or disassembled articles, GRI 2(a) does not offer assistance. General Rule of Interpretation 2(b) does provide classification guidance.

General Rule of Interpretation 2(b) provides, in part, that "[t]he classification of goods consisting of more than one material or substance shall be classified according to the principles of rule 3." Since the nursing pad subject to this discussion is composed of both a textile fabric component and a component of materials enumerated in heading 4818, HTSUS, it is composed of more than one material and resort must be had to GRI 3.

The initial sentence of General Rule of Interpretation 3 provides that "[w]hen, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be * * *" according to GRI 3(a), (b) or (c). The nursing pads subject to this discussion are, *prima facie*, classifiable in two headings. They are classifiable as "made up articles" of heading 6307, HTSUS, because of the textile fabric component and also as an article of heading 4818, HTSUS, because of their similarity to the *eo nomine* articles and composition of paper pulp, paper, cellulose wadding or webs of cellulose fibers.

General Rule of Interpretation 3(a) states that "when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods * * * those headings are to be regarded as equally specific in relation to the goods, even if one of them gives a more complete or precise description of the goods." The nursing pad subject to this discussion is a composite good[5] and the headings under classification consideration each refer to only part of the materials in the good. Customs will, for that reason, turn to GRI 3(b).

General Rule of Interpretation 3(b) provides, in part, that "composite goods * * * made up of different components * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the * * * component which gives them their essential character, insofar as this criterion is applicable." The GRI's do not provide a definition for the phrase "essential character," but the EN's suggest an illustrative list of factors to consider. Explanatory Note Rule 3(b) (VIII) states that the factors that may be relevant to the determination of "essential character" "will vary between different kinds of goods," but may include the nature of the material or component, its bulk, its quantity, its weight, its value or the role played by the constituent material in relation to the use of the good. *General Rules for the Interpretation of the Harmonized System, Rule 3 (b) Explanatory Note (VIII).*

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[5] *See generally General Rules for the Interpretation of the Harmonized System, Rule 3(b) Explanatory Note (IX)* (providing, in part, that composite goods include goods made up of different components in which "the components are attached to each other to form a practically inseparable whole").

It is the conclusion of the Customs Service that the absorbent component composed of a material enumerated in heading 4818, HTSUS, is the component that gives the nursing pad its essential character. The absorbent material component plays the greatest role in the nursing pad, the absorption of excess milk during lactation. It is also the component that provides the nursing pad with its greatest bulk.

It is, therefore, Customs determination that nursing pads composed of an outer component of a textile fabric or fabrics and with an inner absorbent component of paper pulp, paper, cellulose wadding or webs of cellulose fibers are properly classified, pursuant to GRI 3(b), in heading 4818, HTSUS, as a similar sanitary article.

Nursing Pads of Textile Wadding—Heading 5601

Composed Entirely of Textile Wadding

Commencing the classification of nursing pads composed entirely of textile wadding, these nursing pads, pursuant to GRI 1, are properly classified in heading 5601, HTSUS. Heading 5601, HTSUS, provides for the classification of "Wadding of textile materials and articles thereof; textile fibers, not extending 5 mm in length (flock), textile dust and mill neps."

Wadding, as described by the EN's is "made by superimposing several layers of carded or air-laid textile fibres one on the other, and then compressing them in order to increase the cohesion of the fibres." *Explanatory Note 56.01(A).* It is noted that in order for an article to be wadding, the fibers must be readily separable, such as is possible with cotton balls frequently found in medicine bottles. *See Explanatory Note 56.01(A).*

Heading 5601, HTSUS, provides for the classification of articles of "[w]adding of textile materials." The Explanatory Notes reinforce the classification of nursing pads composed entirely of textile wadding in heading 5601, HTSUS. Explanatory Note 56.01(A)(2) sets forth that "[s]anitary towels and tampons, napkins (diapers) and napkin liners for babies and similar sanitary articles consisting of wadding, whether or not with knitted or loosely woven open-work covering" are classified in heading 5601, HTSUS. Customs, as previously addressed, has concluded that nursing pads are similar to sanitary articles.

It is, therefore, Customs determination that nursing pads composed entirely of textile wadding are properly classified, pursuant to GRI 1, in heading 5601, HTSUS, as articles of wadding of textile materials.

Nursing Pads With Components of Textile Wadding and of Textile Fabrics

Nursing pads for which the absorbent capability is provided by textile wadding, but which are not composed entirely of textile wadding, may not be classified pursuant to GRI 1 in heading 5601, HTSUS. These nursing pads generally have an absorbent inner component of textile wadding, but also have outer components, not primarily designed and intended to provide the article with its absorbent property, composed of one or more textile fabrics. The outer components may be, among other fabrics, lace, nonwoven fabrics that are not wadding or woven fabrics.

Nursing pads composed of an outer component of textile fabric and with an inner absorbent component of textile wadding may not be classified pursuant to GRI 1. A review of the terms of the headings of the HTSUS and the relevant section and chapter notes does not establish a heading into which an article of this nature is properly classifiable, pursuant to GRI 1.

Having determined that General Rule of Interpretation 1 does not resolve this classification matter, the Customs Service reviewed GRI 2. Since nursing pads composed of an outer component of textile fabrics and an inner absorbent component of textile wadding are not incomplete, unfinished, unassembled or disassembled articles, GRI 2(a) does not offer assistance. General Rule of Interpretation 2(b) does provide classification guidance.

General Rule of Interpretation 2(b) provides, in part, that "[t]he classification of goods consisting of more than one material or substance shall be classified according to the principles of rule 3." Since the nursing pad subject to this discussion is composed of both textile fabrics and textile wadding, it is composed of more than one material and resort must be had to GRI 3.

The initial sentence of General Rule of Interpretation 3 provides that "[w]hen, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be * * *" according to GRI 3(a), (b) or (c). The nursing pads subject to this discussion are, *prima facie*, classifiable in two headings. They are classifiable as "made up articles" of heading 6307, HTSUS, because of the textile fabric

component and also as an article of "[w]adding of textile materials" of heading 5601, HTSUS, because of the textile wadding component. *See* Headings 5601 and 6307, HTSUS.

General Rule of Interpretation 3(a) states that "when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods * * * those headings are to be regarded as equally specific in relation to the goods, even if one of them gives a more complete or precise description of the goods." The nursing pad subject to this discussion is a composite good and the headings under classification consideration each refer to only part of the materials in the good. Customs will, for that reason, turn to GRI 3(b).

General Rule of Interpretation 3(b) provides, in part, that "composite goods * * * made up of different components * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the * * * component which gives them their essential character, insofar as this criterion is applicable." The GRI's do not provide a definition for the phrase "essential character," but the EN's suggest an illustrative list of factors to consider. Explanatory Note Rule 3(b) (VIII) states that the factors which may be relevant to the determination of "essential character" "will vary between different kinds of goods," but may include the nature of the material or component, its bulk, its quantity, its weight, its value or the role played by the constituent material in relation to the use of the good. *General Rules for the Interpretation of the Harmonized System, Rule 3 (b) Explanatory Note (VIII).*

It is the conclusion of the Customs Service that the inner absorbent component composed of textile wadding is the component that gives the nursing pad its essential character. The absorbent component plays the greatest role in the nursing pad, the absorption of excess milk during lactation. It is also the component that provides the nursing pad with its greatest bulk.

It is, therefore, Customs determination that nursing pads composed of an outer component of textile fabrics and with an inner absorbent component of textile wadding are properly classified, pursuant to GRI 3(b), in heading 5601, HTSUS, as articles of wadding of textile materials.

Nursing Pads of Woven Fabric or of Nonwoven Fabric, But Not Wadding—Heading 6307

Heading 6307, HTSUSA, a residual heading, provides for the classification of "Other made up articles, including dress patterns." It is Customs determination, pursuant to GRI 1, that heading 6307, HTSUSA, and no other heading, provides for the classification of nursing pads composed entirely of woven textile fabrics or of nonwoven textile fabrics that are not wadding.[6]

The expression "made up," as used in heading 6307, HTSUSA, is defined in Section XI, note 7. "Made up," pursuant to the section note, means articles,

> (a) Cut otherwise than into squares or rectangles;
>
> (b) Produced in the finished state, ready for use (or merely needing separation by cutting dividing threads) without sewing or other working (for example, certain dusters, towels, tablecloths, scarf squares, blankets);
>
> (c) Hemmed or with rolled edges, or with a knotted fringe at any of the edges, but excluding fabrics the cut edges of which have been prevented from unravelling by whipping or by other simple means;
>
> (d) Cut to size and having undergone a process of drawn thread work;
>
> (e) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded); or
>
> (f) Knitted or crocheted to shape, whether presented as separate items or in the form of a number of items in the length.

The Explanatory Notes to heading 6307, HTSUSA, indicate that this heading is intended to include made up articles of any textile material, provided the articles are "**not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature." *Explanatory Note 63.07.* Explanatory Note 63.07 further provides that made up articles include "[s]anitary towels (**excluding** those of **heading 56.01**).[7]" *Explanatory Note 63.07 (14).* The EN's do not define "sanitary towels," but a review of the Explanatory

[6] A nonwoven textile fabric may upon initial examination appear to be wadding. If the textile fibers are not "readily separable," the material is not wadding, but rather a nonwoven textile fabric.

[7] The sanitary towels excluded from heading 6307, HTSUS, would be those with an absorbent component of textile wadding, the material of heading 5601, HTSUS, articles.

Notes to heading 5601, HTSUS, suggests that sanitary towels are similar to "[s]anitary * * * tampons, napkins (diapers) and napkin liners for babies and similar sanitary articles * * *." *Explanatory Note 56.01(A)(3).* These sanitary articles are similar to those addressed in the analysis of heading 4818, HTSUS. The reasoning set forth concerning sanitary articles of heading 4818, HTSUS, is equally applicable to sanitary towels and articles of heading 6307, HTSUS.

It is, therefore, Customs determination that nursing pads composed entirely of woven textile fabrics or of nonwoven textile fabrics that are not wadding are not included more specifically elsewhere in the schedule, that they are described by section XI, note 7 and are properly classified at the heading level in heading 6307, HTSUS. Sanitary towels referenced in the Explanatory Notes, which Customs notes is not a term routinely employed in the United States, are a type of sanitary article. Nursing pads, as addressed previously, are sanitary articles.

Clothing Accessories and Heading 6217

The Customs Service has previously issued ruling letters classifying nursing pads, without regard to the material or substance that afforded the article its absorbent capability, in heading 6217, HTSUS. Heading 6217, HTSUS, provides, in part, for the classification of "Other made up *clothing accessories* * * *." (Emphasis added). Customs has now determined, subsequent to an exhaustive review of the tariff schedule and the Explanatory Notes, that nursing pads are not clothing accessories and should not be classified in heading 6217, HTSUS.

Customs conclusion that nursing pads were clothing accessories was based on a review of the Explanatory Notes and the decision that nursing pads are "accessories," that is, that they are secondary or subordinate in importance to clothing articles, adding to the beauty, convenience and effectiveness of the article. It is now Customs determination that nursing pads are not "accessories" and that Explanatory Note 62.17, when read in its entirety, does not support the classification of nursing pads in heading 6217, HTSUS.

Explanatory Note 62.17 lists twelve categories of articles that should be classified as clothing accessories, or as parts of garments or clothing accessories. The items enumerated in EN 62.17 include: dress shields; shoulder or other pads; belts of all kinds (including bandoliers) and sashes; muffs; sleeve protectors; sailor's collars; epaulettes and brassards; labels, badges, emblems, "flashes" and the like; frogs and lanyards; separately presented removable linings for raincoats and similar garments; pockets, sleeves, collars, collarlettes, wimples, fallals of various kinds, cuffs, yokes, lapels and similar items; and stockings, socks and sockettes.

Customs had previously placed considerable emphasis on the similarities between dress shields and shoulder pads, and nursing pads. It is now the determination of this office that Customs should not focus on only dress shields and shoulder pads when attempting to draw analogies to nursing pads, but must take into consideration all of the items listed in the Explanatory Note.

Nursing pads, like dress shields, are worn in addition to the wearer's clothing and do protect the wearer's clothing from perspiration staining. Dress shields, unlike nursing pads, are principally intended to protect the wearer's clothing. While nursing pads will protect the wearer's brassiere and outer garment from possible staining, its primary use is to absorb excess milk, not protect the wearer's clothing, particularly the brassiere. Nursing mothers wear nursing brassieres for a limited period of time and concerns about staining are minimal. Customs notes that nursing pads are generally purchased from maternity stores or drug stores, where as dress shields are generally purchased in fabric stores.

Shoulder pads are designed and intended to complement the wearer's clothing and, unlike nursing pads, have no protective function. Customs, as previously discussed, has concluded that the use of nursing pads for any purpose other than the absorption of excess milk during lactation is fugitive. Should pads, in this regard, are not analogous to nursing pads.

A review of all of the items listed in EN 62.17 convinces Customs that nursing pads are not properly classified in heading 62.17, HTSUS. While nursing pads do have similarities with dress shields and shoulder pads, particularly dress shields, Customs concludes that a fair and accurate interpretation of EN 62.17 necessitates that nursing pads be compared to all of the items listed. When the features and uses of nursing pads are weighted against the features and uses of all of the items enumerated in EN 62.17, it is evident to Customs that nursing pads are not sufficiently analogous and should not be classified in heading

6217, HTSUS. Nursing pads have little or nothing in common with items such as belts, sashes muffs, sleeve protectors, sailor's collars, epaulettes, brassards, labels, badges, emblems, "flashes," frogs, lanyards, removable linings for raincoats, pockets, sleeves, collars, collarlettes, wimples, fallals, cuffs, yokes, lapels, stockings, socks and sockettes.

The Customs Service is aware of HQ 963488 (May 2, 2000) and NY D82853 (Oct. 16, 1998) classify similar nursing pads as clothing accessories in heading 6217, HTSUS. Customs is re-examining the classification of this merchandise in heading 6217, HTSUS. If a decision is made to reclassify the merchandise in the identified ruling letters, the Customs Service will proceed in accordance with 19 U.S.C. 1625(c).

TL Care's Nursing Pad of Woven Cotton Fabric

Commencing classification of the TL Care nursing pad, in accordance with the dictates of GRI 1, the Customs Service examined the headings of the HTSUSA. Heading 6307, HTSUSA, a residual heading, provides for the classification of "Other made up articles, including dress patterns." It is Customs determination, as previously set forth in this ruling letter, that heading 6307, HTSUSA, and no other heading, provides for the classification of nursing pads composed entirely of woven cotton fabric.

It is Customs determination that nursing pads composed entirely of woven cotton fabric are not included more specifically elsewhere in the schedule and that they are articles assembled by sewing, gumming or otherwise as describe by section XI, note 7 (e). Nursing pads, as previously resolved, are sanitary articles similar to sanitary towels.

Continuing the classification of TL Care's nursing pad composed solely of four layers of 100 percent woven cotton fabric, the article is classified in subheading 6307.90.9889, HTSUSA. Subheading 6307.90.9889, HTSUSA, provides for the classification of:

6307	Other made up articles, including dress patterns:		
6307.90		Other:	
			Other:
6307.90.98			Other,
			Other:
6307.90.9889			Other.

Holding:

The TL Care nursing pad, composed entirely of woven cotton fabric, is classified in subheading 6730.90.9889, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty is seven (7) percent, *ad valorem*.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF A RULING LETTER AND REVOCATION OF TARIFF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF LAMSTUDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of a tariff classification ruling letter and revocation of treatment relating to the tariff classification of lamstuds.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke one ruling letter pertaining to the tariff classification of lamstuds and to revoke any treatment previously accorded by Customs to substantially identical merchandise. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before September 13, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. To arrange to inspect comments submitted, contact Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Rebecca Hollaway, Textiles Branch, (202) 572–8814.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke one ruling letter pertaining to the tariff classification of lamstuds. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (NY) F84037, dated March 27, 2000, (attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice which is contrary to the position set forth in the proposed ruling letter, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise a rebuttable presumption of a lack of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY F84037, Customs found that the lamstud products were specially constructed for use as structural wood members in modular homes and that the manufacturing process provided extra stability and dedicated the product for use as builder's carpentry. Thus, we classified the merchandise under subheading 4418.90.4040, HTSUS. However, we discovered that lamstud products are also used in non-structural applications and that the manufacturing process does not confer any specific dedication of the product. We now find that the lamstud manufacturing process produces general use lumber that has been edge-jointed and glued together. Customs intends to revoke the above mentioned ruling letter and reclassify the lamstuds described therein under subheading 4421.90.9740, HTSUS. Customs further intends to revoke any other ruling not specifically identified, in order to classify this merchandise under subheading 4421.90.9740, HTSUS. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially

identical merchandise. Before taking this action, we will give consideration to any written comments timely received.

Proposed HQ 964620 is set forth as Attachment B to this document.

Dated: July 31, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 27, 2000.

CLA–2–44:RR:NC:2:230 F84037
Category: Classification
Tariff No. 4418.90.4040

MR. JAMES F. MORGAN
PBB USA, INC.
883–D Airport Park Rd.
Glen Burnie, MD 21061

Re: The tariff classification of laminated wall studs and ceiling framing members ("Lamstuds") from Canada.

DEAR MR. MORGAN:

In your letter dated March 2, 2000, on behalf of your principal, IBL Incorporated of Quebec, Canada, you requested a tariff classification ruling.

The ruling was requested on a product manufactured by your principal and referred to as "Lamstuds" (trademarked, patent pending). Lamstuds are specially constructed for use as framework in modular homes. They consist of several pieces of wood (S-P-F) laminated together in a particular manner to produce stable structural wood members.

Two sample sections of Lamstuds were submitted. The actual measurements of the samples are as follows: 1-7/16″ thick x 3-7/16″ wide x 16-1/4″ long and 1-7/16″ thick x 5-3/8″ wide x 15-1/8″ long. The samples are assembled wood products composed of tongued and grooved pieces of wood which have been edge-glued and finger-jointed together.

Based on the samples and the information submitted, the Lamstuds are constructed as follows:

1. Each short piece of wood (1-3/4″ to 5″ wide) is cleared of defects, e.g., knots.
2. Each wood piece is cut to a precise length, i.e., 12″ to 36″ and put in a respective accumulator.
3. Each piece is double tongued and grooved on the edges.
4. The double T&G wood pieces are pressed together producing edge-glued boards.
5. The edge-glued wood is now cut into boards of 2 x 4's or 2 x 6's, nominal.
6. The short pieces of 2 x 4's or 2 x 6's (12″ to 36″ long) are finger-jointed to produce various lengths (including PET—precision end trimmed) from 7 to 16 feet.

Lamstuds will be imported in various nominal dimensions, such as, 2″ x 4″ x 8′, 2″ x 6″ x 8′, 2″ x 4″ x 9′ and 2″ x 6″ x 9′ for use as kitchen wall studs and 2″ x 6″ x 12′, 2″ x 6″ x 14′ and 2″ x 6″ x 16′ for use as ceiling framing members.

Classification of goods under the Harmonized Tariff Schedule of the United States (HTSUS) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relevant section or chapter notes.

Heading 4418, HTSUS, provides for:

> Builders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes.

The Explanatory Notes'(EN's) to the HTSUS constitute the official interpretation of the tariff at the international level. Although not legally binding, the EN's provide a commentary on the scope of each heading and are thus useful in ascertaining the classification of merchandise under the HTSUS.

The EN's to heading 4418 state in pertinent part:

> This heading applies to woodwork, * * * used in the construction of any kind of building, etc., in the form of assembled goods or as recognizable unassembled pieces * * *.
>
> The term "joinery" applies more particularly to builders' fittings (such as doors, windows, shutters, stairs, door or window frames),whereas the term "carpentry" refers to woodwork (such as beams, rafters and roof struts) used for structural purposes * * *.

The subject Lamstuds satisfy the above EN description. They are fabricated structural components of walls and ceilings, in the form of assembled goods. Thus, they are classifiable according to the terms of heading 4418.

The applicable subheading for the Lamstuds will be 4418.90.4040, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for builders' joinery and carpentry of wood; other; other; other fabricated structural wood members. The general rate of duty will be 3.2 percent ad valorem.

The holding set forth above applies only to the specific factual situation and merchandise description as identified in the ruling request. This position is clearly set forth in 19 CFR 177.9(b)(1). This section states that a ruling letter is issued on the assumption that all of the information furnished in connection with the ruling letter and incorporated therein, either directly, by reference, or by implication, is accurate and complete in every material respect.

This ruling is being issued under the assumption that the subject goods, in their condition as imported into the United States, conform to the facts and the description as set forth both in the ruling request and in this ruling. In the event that the facts or merchandise are modified in any way, you should bring this to the attention of Customs and you should resubmit for a new ruling in accordance with 19 CFR 177.2. You should also be aware that the material facts described in the foregoing ruling may be subject to periodic verification by the Customs Service.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Paul Garretto at 212–637–7009.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964620 RH
Category: Classification
Tariff No. 4421.90.9740

MR. JAMES F. MORGAN
SENIOR CONSULTANT
TRADE & REGULATORY SERVICES
PBB GLOBAL LOGISTICS
883–D Airport Park Road
Glen Burnie, MD 21061

Re: Proposed Revocation of NY F84037; Request for Tariff Classification Ruling on Lamstuds; Heading 4421; Heading 4418; Edge-glued lumber.

DEAR MR. MORGAN:

This is in reply to your letter of September 13, 2000, on behalf of IBL Inc., requesting a ruling on the classification of "lamstuds."

We have also reviewed New York Ruling Letter (NY) F84037, dated March 27, 2000, issued to you, on behalf of IBL, Inc., concerning the classification of lamstuds constructed for use as framework in modular homes. The manufacture of the wood in that case is identical to the manufacture of the wood in your current request.

In NY F84037, we held that the lamstuds were fabricated structural components of walls and ceilings, in the form of assembled goods, and were classifiable under subheading 4418.90.4040 of the Harmonized Tariff Schedule of the United States (HTSUS). However, after further review of the facts in both submissions we find that NY F84037 is incorrect. The correct classification of the lamstuds is under heading 4421, HTSUS, as other articles of wood.

Facts:

You describe the manufacture of the lamstuds in both submissions as follows:

1. Each short piece of wood (1-3/4″ to 5″ wide) is cleared of defects, e.g., knots;
2. Each wood piece is cut to a precise length, e.g., 12″ to 36″ and put into a respective accumulator;
3. Each piece is double tongued and grooved on the edges;
4. The double tongued and grooved wood pieces are then pressed together forming edge-glued boards;
5. The edge-glued wood is now cut into boards, and the short pieces are finger-jointed to produce various lengths, then precision end-trimmed to the finished size desired.

In the instant ruling request, you state that the lamstuds will be used as door panels, floor joists, door lintels and ceiling rafters.

Issue:

What is the correct classification of the lamstuds?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Chapter 44, HTSUS, provides for, among other things, wood and articles of wood. This chapter is structured so that less processed wood appears at the beginning of the chapter followed by more advanced wood in later headings within the same chapter. Thus, for example, heading 4403, HTSUS, is a general provision for wood in the rough, whether or not stripped of bark or sapwood or roughly squared, and heading 4421, HTSUS, is a basket provision for more advanced articles of wood that cannot be classified elsewhere in the chapter.

Additionally, the Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System constitute the official interpretation of the nomenclature at the international level. The EN's are not legally binding. However, they do represent the considered views of classification experts of the Harmonized System Committee. It has therefore been the practice of the Customs Service to follow, whenever possible, the terms of the EN's when interpreting the HTSUS.

Heading 4418 provides for, among other things, builder's joinery and carpentry of wood. The EN to heading 4418, HTSUS, state in pertinent part:

> This heading applies to woodwork, including that of wood marquetry or inlaid wood, used in the construction of any kind of building, etc., in the form of assembled goods or as recognizable unassembled pieces (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly), whether or not with their metal fittings such as hinges, locks, etc.
>
> The term "joinery" applies more particularly to builders' fittings (such as doors, windows, shutters, stairs, door or window frames), whereas the term "carpentry" refers to woodwork (such as beams, rafters and roof struts) used for structural purposes or in scaffoldings, arch supports, etc., and includes assembled shuttering for concrete constructional work. * * *

In NY F84037, we determined that the lamstud products were specially constructed for use as structural wood members in modular homes and that the manufacturing process provided extra stability and dedicated the product for use as builder's carpentry.

However, the present ruling request shows that the lamstud products are also used in non-structural applications and that the manufacturing process does not confer any specific dedication of the product. We now find that the lamstud manufacturing process produces general use lumber that has been edge-jointed and glued together.

In Headquarters Ruling Letter (HQ) 088292, dated February 21, 1991, Customs held that a 4" square hemlock post composed of edge-glued lumber, not otherwise worked, was classified in heading 4421, HTSUS, as opposed to heading 4418, HTSUS. The ruling reads in pertinent part:

> The merchandise as imported is not sufficiently finished to constitute either joinery or carpentry * * * Both joinery and carpentry consist of articles which have been subject to some form of millwork or other working associated with a specific end product. The imported blanks may be suitable for any number of purposes, including manufacture into builders' joinery. However, at the time of importation that ultimate use is not evident from the condition of the goods. In our opinion they are not sufficiently advanced to be considered articles of heading 4418, HTSUS.

Moreover, Customs has consistently classified square cut edge-glued lumber, not otherwise worked than cut to size, in heading 4421, HTSUS. See NY 836623, dated March 2, 1989; NY 838097, dated April 6, 1989; NY 844916, dated September 20, 1989; and NY F88847, dated July 19, 2000.

We note that subheading 4418.90.20, HTSUS, provides for "Edge-glued lumber." However, the terms of a subheading at the 8-digit level such as this can only be read in light of the terms of the superior headings. In this case, the superior heading, 4418,HTSUS, provides for specific articles, namely builders' joinery and carpentry. However, if as in this case, the merchandise does not fit within the scope of the heading, the heading must be discounted, and examination of its subheadings is precluded. Thus, although "edge-glued lumber" may describe the goods, we are precluded by the superior heading from classifying the goods under subheading 4418.90.20, HTSUS.

Following the same reasoning in HQ 088292, we find that the lamstud products are not sufficiently advanced to be considered builder's joinery or carpentry of wood and are correctly classified under subheading 4421.90.9740, HTSUS.

Holding:

NY F84037 is hereby REVOKED. The lamstuds are classified under subheading 4421.90.9740, HTSUS. They are dutiable at the general column one rate at 3.3 percent *ad valorem*.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

(Slip Op. 02–72)

CONSOLIDATED BEARINGS CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 98–09–02799

(Dated July 24, 2002)

ORDER

TSOUCALAS, *Senior Judge:* Upon receipt and consideration of the defendant's motion for clarification dated July 18, 2002, and the plaintiff's comments to the aforesaid motion dated July 22, 2002, this Court recognizes that there was an error committed in handling of the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand: Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China ("Remand Results II")* (April 17, 2002), issued pursuant to the Court's order in *Consolidated Bearing Co. v. United States,* 26 CIT ___, 182 F. Supp. 2d 1380 (2002).

Commenting on the *Remand Results II,* the plaintiff raises the following points: (a) in its pursuit of the course of action designated in the *Remand Results II,* "Commerce hopes to avoid [Commerce's] inevitable day of reckoning [of dumping margins specifically for the merchandise entered by the plaintiff during the period of review ("POR") at issue] as well as [Commerce's] responsibility as an agency to issue *appropriate instructions";* (b) in the *Remand Results II,* Commerce "chose a result that ha[s] no relevance to [the plaintiff's] imports of [the merchandise at issue during [the POR]"; and (c) the course of actions chosen by Commerce in the *Remand Results II* would "divulge proprietary data [of another entity] *to* [the plaintiff, and this wrongful act by Commerce is feasible since that proprietary data] is not subject to [a] judicial protective order in this proceedings." Pl.'s Comments Concerning Def.'s Mot. Clarification ("Pl.'s Comments") at 2–3 (emphasis supplied).

The Court is not convinced by these arguments. There could be no "inevitable day of reckoning" for Commerce, same as there is no Com-

merce's "responsibility * * * to issue *appropriate instructions*" under the holdings of *Consolidated Bearing Co. v. United States ("Consolidated I")*, 25 CIT ____, 166 F. Supp. 2d 580 (2001), and *Consolidated Bearing Co. v. United States ("Consolidated II")*, 26 CIT ____, 182 F. Supp. 2d 1380 (2002), since both cases required Commerce to liquidate all plaintiff's imports of the subject merchandise imported during the POR "in accordance with the September 9, 1997, liquidation instructions." *Consolidated II*, 26 CIT at ____, 182 F. Supp. 2d at 1384. Thus, the only "appropriate instructions" are the September 9, 1997, liquidation instructions, and the only "reckoning" that Commerce was obligated to execute was the reckoning included in the text of the September 9, 1997, liquidation instructions.

Furthermore, since, under the September 9, 1997, liquidation instructions, "the merchandise [which was] produced by [a particular manufacturer] and imported by certain designated importers, the list of which did not include [the plaintiff, had to be liquidated] at certain rates," *Consolidated I*, 25 CIT at ____, 166 F. Supp. 2d at 582, these very rates, the ones determined under the September 9, 1997, liquidation instructions, are the only rates applicable to the plaintiff's merchandise. Therefore, Commerce's decision to "instruct [the United States Customs Service ("Customs")] to use *ad valorem* rates [for] each class or kind of [the plaintiff's merchandise that would be equal to the rates Commerce] calculated" under the September 9, 1997, liquidation instructions for corresponding classes or kinds of merchandise imported by another entity, would not create "a result that ha[s] no relevance to [the plaintiff's] imports of [the merchandise at issue during" the POR. *Compare* ("Pl.'s Comments") at 2.

Therefore, having re-reviewed the *Remand Results II*, it is hereby

ORDERED that the *Remand Results II* are affirmed in their entirety,[1] the Court's order of July 9, 2002, is vacated; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

---

[1] This reconsideration of the *Remand Results II* is given on the merits of the *Remand Results II*, as read in light of *Consolidated I*, 25 CIT ____, 166 F. Supp. 2d 580, and *Consolidated II*, 26 CIT ____, 182 F. Supp. 2d 1380. While the Court appreciates Commerce's reminders that: (a) Commerce is not equipt with the power to actually liquidate the plaintiff's entries (versus instructing Customs to do so); and (b) Commerce is prohibited from instructing Customs to liquidate the plaintiff's entries prior to the issuance of a final Court's decision, these issues are irrelevant either to the merits of this case or to the grounds for the Court's reconsideration.

(Slip Op. 02–73)

SHINYEI CORP. OF AMERICA, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–05–00271

(Dated July 25, 2002)

ORDER

TSOUCALAS, *Senior Judge:* Plaintiff Shinyei Corporation of America ("Shinyei") requests this Court to: (a) hold unlawful liquidations by the United States Customs Service ("Customs") executed with regard to the merchandise at issue in this action; and (b) remand this matter to Customs with instructions to re-liquidate the merchandise at issue in accordance with such instructions as the United States Department of Commerce, International Trade Administration ("Commerce") may issue. Commerce, in turn: (a) admits that Customs erred in liquidating the consumption entries at issue at the rate at which estimated antidumping duties were required to be deposited upon entry of the merchandise at issue; and (b) requests this Court to remand this case to Commerce for the purpose of issuing instructions to Customs on the basis of Commerce's *Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan ("Final Results")*, 54 Fed. Reg. 19,101 (May 3, 1989) and this Court's decisions with respect to the *Final Results*, 54 Fed. Reg. 19,101. Based on the foregoing, it is hereby

ORDERED that this case is remanded to Commerce to issue instructions to Customs to re-liquidate the merchandise at issue in accordance with Commerce's determination made in the *Final Results*, 54 Fed. Reg. 19,101, and pertinent decisions of this Court; and it is further

ORDERED that the remand results are due within ninety (90) days of the date that this order is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date the responses or comments are due.

(Slip Op. 02–74)

FORMER EMPLOYEES OF GALEY & LORD INDUSTRIES, INC., PLAINTIFFS *v.* ELAINE L. CHAO, U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 01–00130

[Upon appeal from the denial of certification of eligibility to apply for trade adjustment assistance, judgment for the defendant.]

(Decided July 30, 2002)

Buckley & Klein, LLP (Edward D. Buckley) for the plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen*, Director, and *Lucius B. Lau*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Delfa Castillo)*; and Office of the Solicitor, Division of Employment & Training Legal Service, U.S. Department of Labor *(Jay Reddy)*, of counsel, for the defendant.

MEMORANDUM

AQUILINO, *Judge:* This action arises out of two current, pervasive and yet different American phenomena, namely, the discontinuance of domestic manufacturing and displacement of workers therein, and the reliance on the *Internet* even for matters formerly composed with greater care. In this instance, upon reception of an amorphous transmittal on or about April 9, 2001,

and consistent with established practice, the Clerk of this Court of International Trade deemed the content thereof to be a timely appeal from a denial by the U.S. Department of Labor's Employment and Training Administration ("ETA") of a petition on behalf of employees "engaged in yarn manufacturing at Galey & Lord Ind., Inc. plant in Shannon, Georgia"[1] for certification of eligibility to apply for trade adjustment assistance. *See* ETA, *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance,* 66 Fed.Reg. 9,599 (No. TA-W–38,376) (Feb. 8, 2001).

I

That petition was filed on ETA Form 8650 for assistance under the Trade Act of 1974, as amended, 19 U.S.C. §2271 *et seq.* It pointed to Galey & Lord product(s) described as

> [c]otton and cotton blended carded and combed yarns used in the production of cotton and cotton blended fabrics, primarily twills and poplins[2,]

---

[1] Plaintiffs' packet contains materials which include apparent facsimiles of reports on Forms 8–K and 10–K filed in 2001 with the Securities and Exchange Commission in the name of Galey & Lord, Inc., while defendant's administrative record ("AR"), such as it is and which has been filed herein, references plaintiffs' erstwhile employer as Galey & Lord *Industries*, Inc.

Insofar as this decision is concerned, the court assumes this corporate-name discrepancy is not of moment.

[2] AR, p. 2.

and reported related worker separations totalling 120 and 480 on November 20 and 27, 2000, respectively. *See* AR, p. 2. The petition concluded with the following averment:

> During the last several years there has been a significant increase in the quantity of yarn imports into the U.S. in the categories (300—Carded Yarns, 301—Combed Yarns) produced at the Shannon, Georgia facility. At the same time, there have been equally significant increases in the importing of the fabrics for which these yarns are used (Categories 317—Cotton Twills and 314—Cotton Poplin and Broadcloth). The continued growth of imported yarns and fabrics in the U.S. market has resulted in significant downward pressure on the price of those products realized by the Company which has resulted in the erosion of profit margins.
>
> The factors; continued growth of imports in the U.S. market, negative pricing pressure and profit erosion with no prospect for change in the trend have made any significant capital investment for modernization impractical. The result is the closure of the previously identified yarn manufacturing operations.

Id. at 3.

Plaintiffs' packet of papers now part of the court's case file contains a letter to one of the displaced Galey & Lord employees from the Georgia Department of Labor that refers to "pursuing other options that may be of assistance to the workers laid off", as well as a copy of a petition on ETA Form 9042 for NAFTA Transitional Adjustment Assistance filled out by hand in the name of that and two other employees presumably similarly situated and bearing the scribbled date April 6, 2001, or just before this action commenced.

Above-named counsel then formally appeared in this action on behalf of the plaintiffs, whereupon traditional give-and-take ensued between the parties as to scheduling and also whether or not the Form 9042 had been forwarded to the Governor of Georgia, as contemplated by 19 U.S.C. §2331(b)(1), and, if so, whether he had timely notified the defendant thereof, as is required by section 2331(b)(2)(A). In any event, their interchange was followed by defendant's Consent Motion for Remand to the Department of Labor for Reconsideration, which was granted.

The results of that remand have been filed herein, and the plaintiffs present a formal response. Defendant's reply thereto prays for judicial affirmance of its negative determination(s) of eligibility for adjustment assistance and for dismissal of this action.

The court's jurisdiction to grant such relief is pursuant to 19 U.S.C. §2395 and 28 U.S.C. §§ 1581(d)(1), 2631(d)(1).

II

Under the Trade Act of 1974, as amended, the Secretary of Labor shall certify workers as eligible to apply for adjustment assistance if she determines

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have be-

> come totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. §2272(a). Subsection 2272(b)(1) defines "contributed importantly" to mean "a cause which is important but not necessarily more important than any other cause."

On this statute's face, and as reaffirmed by the courts, all three of the foregoing requirements must be satisfied by petitioners for assistance. *See, e.g., Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. United States,* 22 CIT 712, 713, 20 F.Supp.2d 1288, 1290 (1998). In reviewing ETA determinations,

> the findings of fact by the Secretary of Labor * * *, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary to take further evidence * * *.

19 U.S.C. §2395(b). *See* 28 U.S.C. §2640(c). *See also Former Employees of Shaw Pipe, Inc. v. United States,* 21 CIT 1282, 1284, 988 F.Supp. 588, 590 (1997) (such determinations must be in accordance with law). "Substantial evidence * * * must be enough reasonably to support a conclusion". *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F.Supp. 961, 966 (1986), *aff'd,* 810 F.2d 1137 (Fed.Cir. 1987), citing *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed.Cir. 1984). "Good cause [to remand] exists if the Secretary's chosen methodology is so marred that his finding is arbitrary or of such a nature that it could not be based on substantial evidence". *Former Employees of Barry Callebaut v. United States,* 25 CIT ____, ____, 177 F.Supp.2d 1304, 1308 (2001), citing *Former Employees of Linden Apparel Corp. v. United States,* 13 CIT 467, 469, 715 F.Supp. 378, 381 (1989), quoting *United Glass & Ceramic Workers of North America, AFL-CIO v. Marshall,* 584 F.2d 398, 405 (D.C.Cir. 1978). But, in general, "the nature and extent of the investigation are matters resting properly within the sound discretion of the administrative officials". *Former Employees of CSX Oil & Gas Corp. v. United States,* 13 CIT 645, 651, 720 F.Supp. 1002, 1008 (1989), quoting *Cherlin v. Donovan,* 7 CIT 158, 162, 585 F.Supp. 644, 647 (1984).

A

The ETA's initial negative determination herein states that its investigation of the facts and circumstances of plaintiffs' lost jobs revealed that the criteria of 19 U.S.C. §2272(a)(3), *supra,* were not met because

> [t]he yarn produced by the workers at the subject firm was produced for internal consumption in the company's manufacturing process. Galey & Lord did not import yarn in the time period relevant to the investigation.

AR, p. 35. *See* 66 Fed.Reg. at 9,599. Upon reconsideration after the court-ordered remand, the ETA affirmed its original notice, denying eligibility to apply for adjustment assistance for the plaintiffs. That affirmance reports, in sum and substance:

> On remand, the Department contacted officials of Galey & Lord to obtain clarification of the production and employment data provided with respect to the worker group in Shannon, Georgia. Although workers at the plant produced yarn and fabric, the petition was filed by a company official on behalf the [*sic*] workers at the plant producing yarn. The information obtained * * * on remand[] show [*sic*] that the production data provided for 1998 through November 2000[] was [*sic*] specifically for yarn production. The employment data provided by the subject firm for that same time period was [*sic*] for all workers at the Shannon * * * plant. The workers are separately identifiable between yarn and fabric production.
>
> Other findings on remand show that the company imported insignificant quantities of yarn and fabric during the time period relevant to the investigation. Those imports were for evaluation purposes only and were not imported on a sustained basis.

Supplemental AR, pp. 4–5.

Plaintiffs' counsel are seemingly unable to take exception to this determination, predicated as it is upon 19 U.S.C. §2272(a)(3), *supra. See* Plaintiffs' Response to the Department of Labor's Redetermination Upon Remand *passim.* Indeed, there is enough evidence on the record to reasonably support it. The record indicates, for example, that Galey & Lord was seeking to maximize efficiency and assure long-term profitability by closing the yarn operation and modernizing its remaining weaving division. The production of yarn was to be outsourced to Parkdale Mills Inc., a North Carolina-, as opposed to foreign-, based company, enabling Galey & Lord to acquire yarn as needed at lower cost. Money saved by the closing was for purchase of "state-of-the-art looms for the weaving operation." AR, p. 5. Moreover, the yarn that had been produced by the displaced workers was not for the open market; it was consumed by Galey & Lord itself in manufacturing fabrics. Thus, that yarn was not in direct competition with the imports. *See, e.g., Former Employees of Hewlett-Packard Co. v. United States,* 17 CIT 980, 985–86 (1993) (ETA exercise of its discretion sustained when it determined that the causal nexus required by the statute not satisfied by the mere presence of imports in U.S. market).

B

The essence of the response interposed by counsel to defendant's remand results is that

> [c]ertification should be granted to the former employees of Galey & Lord under the NAFTA amendment to the Trade Act of 1974, 19 U.S.C. §2331. It is noteworthy that certification was granted under NAFTA-TAA for workers from a Galey & Lord plant in Eagle Pass, Texas due to a shift in production to Mexico (NAFTA No. 2966). In the instant case, under 19 U.S.C. §2331(1)(iii) [*sic*], there has been a shift in production by Galey & Lord to Mexico of articles like or directly competitive with articles which were produced by the yarn workers who are Petitioners herein. Galey & Lord admits as much in the papers it ha filed with the Department of Labor. Consequently, its former yarn workers are entitled to receive Transitional Adjustment Assistance.

Plaintiffs' Response, pp. 6–7.

This court cannot concur. Section 2331 of Title 19, U.S.C. is the codification of the NAFTA Worker Security Act adopted by Congress as Subtitle A of Title V of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2149–54 (Dec. 8, 1993). That subtitle added the NAFTA Transitional Adjustment Assistance Program to Title II, Chapter 2 of the Trade Act of 1974, Pub. L. 93–618, 88 Stat. 1978, 2019–30 (Jan. 3, 1975). Part of that program was to add a subsection (t) to section 3306 of the Internal Revenue Code, defining "self-employment assistance program" to encompass, among other things, individuals who "are eligible to receive regular unemployment compensation * * * under State law"[3] and who "are participating in self-employment assistance activities which * * * are approved by the State agency"[4]. Congress further provided therein that such program "meet[] such other requirements as the Secretary of Labor determines to be appropriate." 26 U.S.C. §3306(t)(6). In sum, the road to NAFTA transitional adjustment assistant begins in particular displaced workers' home states, before connecting to Washington, to wit:

> **(b) Preliminary findings and basic assistance**
>
> **(1) Filing of petitions**
>
> A petition for certification of eligibility to apply for adjustment assistance under this subpart may be filed by a group of workers * * * with the Governor of the State in which such workers' firm or subdivision thereof is located.
>
> **(2) Findings and assistance**
>
> Upon receipt of a petition under paragraph (1), the Governor shall—
>
> **(A)** notify the Secretary [of Labor] that the Governor has received the petition;

---

[3] 26 U.S.C. §3306(t)(3)(A).

[4] 26 U.S.C. §3306(t)(3)(C).

> **(B)** within 10 days after receiving the petition—
>
> **(i)** make a preliminary finding as to whether the petition meets the criteria described in subsection (a)(1) of this section (and for purposes of this clause the criteria described under subparagraph (A)(iii) of such subsection shall be disregarded), and
>
> **(ii)** transmit the petition, together with a statement of the finding under clause (i) and reasons therefor, to the Secretary for action under subsection (c) of this section; and
>
> **(C)** if the preliminary finding under subparagraph (B)(i) is affirmative, ensure that rapid response and basic readjustment services authorized under other Federal law are made available to the workers.
>
> **(c) Review of petitions by Secretary; certifications**
>
> **(1) In general**
>
> The Secretary, within 30 days after receiving a petition under subsection (b) of this section, shall determine whether the petition meets the criteria described in subsection (a)(1) of this section. Upon a determination that the petition meets such criteria, the Secretary shall issue to workers covered by the petition a certification of eligibility to apply for assistance described in subsection (d) of this section.
>
> **(2) Denial of certification**
>
> Upon denial of certification with respect to a petition under paragraph (1), the Secretary shall review the petition in accordance with the requirements of subpart A of this part to determine if the workers may be certified under such subpart.

19 U.S.C. §2331(b) and (c).

Notwithstanding the existence in plaintiffs' packet of the copy of the handwritten petition for such transitional adjustment assistance on ETA Form 9042, which may have been engendered by the March 21, 2001 letter from the Georgia Department of Labor at the behest of that state's Governor, the record at bar does not show either that the petition was ever duly presented (returned) to the Governor in accordance with the foregoing statute or that he timely carried out his responsibilities thereunder, including transmitting the petition to the defendant Secretary for action. In fact, given the date on that petition (April 6, 2001), and of plaintiffs' packet herein (April 9), that petition may well have bypassed both Atlanta and Washington on its way to this court in New York. Clearly, that would not have been the right routing, but plaintiffs' counsel have not responded in a different direction to government queries on this issue[5].

Of course, careful preparation and delivery of such a petition for assistance in accordance with law is of critical importance, in particular giv-

[5] *Compare* Defendant's Consent Motion for an Extension of Time to Request a Voluntary Remand or Reply to Plaintiffs' Response to Labor's Negative Determination, pp. 1–2 (March 14, 2002) *and* Defendant's Motion for an Extension of Time to Reply to Plaintiffs' Response to Labor's Negative Determination, pp. 1–2 (April 4, 2002) *with* Defendant's Reply to Plaintiffs' Response, pp. 3 n. 2, 7–11 (April 18, 2002).

en the magnitude of the dislocations the statute seeks to redress. Lawful presentment and processing of the ETA Form 9042 in this action, however, probably would not have engendered different analysis on the merits. While a preliminary finding by the Governor under 19 U.S.C. §2331(b)(2)(B)(i), *supra,* shall disregard the criteria of section 2331(a)(1)(A)(iii), regarding imports from Mexico or Canada, upon his referral of the petition to the ETA, that agency cannot disregard those criteria per section 2331(c)(1), *supra,* and, if its determination under that paragraph (c)(1) is negative, the ETA shall review, per paragraph (c)(2), the petition in accordance with 19 U.S.C. §§ 2271–75. While that subpart A of this Trade Act is not restricted to imports from the two NAFTA partners of the United States, the criteria of 19 U.S.C. §2272(a), *supra,* are defined similarly to those of section 2331(a)(1), *e.g.,* "increase[s] of [in] imports * * * contributed importantly to such * * * separation * * * and to * * * decline in sales or production." Indeed, the controlling definition of "contributed importantly" in 19 U.S.C. §2272(b)(1), *supra,* is *in haec verba* that of subsection 2331(a)(2). Hence, the same analytical approach to a petition on an ETA Form 9042 for NAFTA transitional adjustment assistance, presented with care and processed on the record developed herein, probably would not have resulted in a determination different from the agency's negative determination(s) under section 2272.

III

In view of the foregoing, defendant's negative determination(s) regarding eligibility to apply for trade adjustment assistance must be affirmed and this action dismissed. Judgment will enter accordingly.

(Slip Op. 02–75)

USINOR INDUSTEEL, S.A., DUFERCO CLABECQ, S.A., AG DER DILLINGER HÜTTENWERKE, SALZGITTER AG STAHL UND TECHNOLOGIE, AND THYSSEN KRUPP STAHL AG, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP. AND U.S. STEEL GROUP, A UNIT OF USX CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 01–00006

[ITC motion to certify for interlocutory appeal denied.]

(Dated July 30, 2002)

Barnes, Richardson, & Colburn (Gunter von Conrad and *Stephen W. Brophy)* for plaintiff Usinor Industeel, SA.

White and Case LLP (Walter J. Spak, Lyle B. Vander Schaaf, Joseph H. Heckendorn, and *Caleb W. Sullivan)* for plaintiff Duferco Clabecq, S.A.

DeKieffer and Horgan (J. Kevin Horgan and *Marc E. Montalbine)* for plaintiffs AG der Dillinger Hüttenwerke, Salzgitter AG Stahl und Technologie and Thyssen Krupp Stahl AG.

Lyn M. Schlitt, General Counsel, *James M. Lyons,* Deputy General Counsel, United States International Trade Commission *(Rhonda M. Hughes),* for defendants.

Dewey Ballantine LLP (Alan Wm. Wolff, Kevin M. Dempsey, and *Rory F. Quirk)* and *Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer, John J. Mangan,* and *James C. Hecht)* for defendant-intervenors Bethlehem Steel Corporation and U.S. Steel Group, a unit of USX Corporation.

OPINION

RESTANI, *Judge:* This matter is before the court on Defendant's motion to amend and certify the court's April 29, 2002 order for interlocutory appeal and for stay of the proceeding pending appeal. Defendant, the U.S. International Trade Commission ("Commission" or "ITC") argues that the court's conclusion regarding the definition of "likely" for injury determinations in sunset reviews was incorrect and involves controlling questions of law so as to warrant immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(1). Defendant's motion is denied.

Interlocutory appeals are a departure from the well-established final judgment rule and are reserved for exceptional cases. *See, e.g., Marsuda-Rodgers Int'l v. United States,* 13 CIT 886, 888 (1989); *Washington Int'l Ins. Co. v. United States,* 12 CIT 259, 260 (1988). 28 U.S.C. § 1292(d)(1) provides that the deciding court *may* certify the case for immediate appeal where (1) a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from that order may materially advance the ultimate termination of the litigation.

The Commission argues that the court erred in finding that the term "likely" in 19 U.S.C. § 1675a should be given its ordinary meaning.[1] *Usinor Industeel, SA v. United States,* Slip-Op. 02–39 (Ct. Int'l Trade April

[1] The interpretation of "likely" directly affects not only the Commission's ultimate injury determination but its intermediate findings concerning, *inter alia,* competition overlap, cumulation, and price effects. *See* 19 U.S.C. § 1675a(a)(1) (likelihood of injury upon revocation); § 1675a(a)(2) (volume); § 1675a(a)(3) (price effects); § 1675a(a)(4) (impact on domestic industry); and § 1675a(a)(7) (cumulation, competition overlap, discernible adverse impact).

29, 2002). Repeating its previous position, the Commission again argues that the Statement of Administrative Action, ("SAA") accompanying H.R.Rep. No. 103–826(I), at 883, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4212, contains an alternative definition and should control. With no support, the Commission argues that any order requiring it to apply the ordinary meaning will disrupt all sunset reviews and, ultimately, diminish the significance of the SAA.

The court does not, as the Commission suggests, dispute that the SAA is the authoritative expression of the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994) ("URAA"). *See NTN Bearing Corp. v. United States*, 155 F.Supp.2d 715, 721 (2001). There is no question that the SAA is the authoritative guide in interpreting the URAA. *Allied Tube & Conduit Corp. v. United States,* 127 F.Supp.2d 207, 216–17 n.2 (2000). If a statutory term or phrase were ambiguous and in need of interpretation, the court would look to the SAA first and foremost for direction. *See Taiwan Semiconductor Industry Ass'n v. United States,* 23 CIT 410, 413 n.6, 59 F.Supp.2d 1324, 1328 n.6 (1999). Apart from its statutory approval in 19 U.S.C. § 3512(d), in practical terms the SAA is more compelling than ordinary statutory legislative history. Because unfair trade laws are passed pursuant to fast track procedure with only an up or down vote, normally there is not the possibly conflicting and confused legislative history that often accompanies legislation as it evolves. The SAA is a more detailed and coherent expression of legislative intent.

The Commission argues, however, that, because 19 U.S.C. § 3512(d) provides that the SAA is the authoritative expression of the URAA, the SAA is an extension of the statute and, therefore, its alternative "definition" should be considered statutory and controlling. The court does not read § 3512(d) to transform the SAA into a controlling "statutory" provision that can trump the actual statute. Because the court determined that the undefined term "likely" as found in the statute itself is clear, the inquiry ends there. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). Undefined terms in a statute are deemed to have their ordinary meaning. *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1571 n.9 (Fed. Cir. 1994).[2] The court need not resort to the SAA to interpret what the statute makes clear.[3]

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[2] The Commission submits a variety of alternative definitions from various dictionaries and submits an argument that probable is different from likely. Semantics aside, the dispute is whether the Commission based its determination on the mere possibility of dumped future subject imports. In making its determination, the Commission relied heavily upon Plaintiff's excess capacity to determine that future volume, and therefore future harm, was likely. Generally, excess capacity figures identify how much of a particular product a subject producer could *possibly* manufacture and, perhaps, export to the United States.

It is unclear what standard was actually used here because the Commission and its counsel refused to explain further. It is important to note that, from the beginning, Plaintiffs argued that future imports were *unlikely* and, in support, *inter alia,* presented considerable evidence to the Commission identifying significant changes in the European Community since the initial investigation. Rather than respond, the Commission summarily declared that it was "unconvinced" and found that future imports were likely. On remand, the court required the Commission to explain why significant import volume was likely, not simply possible, in light of Plaintiffs' argument.

[3] The court's adoption of the ordinary meaning of likely is consistent with other Federal Circuit decisions. For example, in *American Lamb Co. v. United States,* the court explained that the statutory phrase "reasonable indication" meant more than a mere possibility. 785 F.2d 994, 1001 (Fed. Cir. 1986). A "reasonable indication" of injury is a lesser standard than likely injury. If "possibility" is insufficient for the former, it is certainly insufficient for the latter. The lesser standard also makes clear that Congress knows how to write different standards into the unfair trade laws.

The Commission incorrectly cites to three cases for the proposition that the Federal Circuit has used the SAA to construe statutory provisions "even when the court had found the statutory language to be unambiguous." Def. Br. at 4. *SKF USA, Inc. v. United States,* 263 F.3d 1369 (Fed. Cir. 2001);[4] *Micron Technology, Inc. v. United States,* 243 F.3d 1301, 1305 (Fed. Cir. 2001);[5] *AK Steel Corp. v. United States,* 226 F.3d 1361, 1366 (Fed. Cir. 2000). In all three, the court merely reaffirmed the established principle that the SAA is the authoritative expression interpreting the URAA. In fact, the court's opinion here is entirely consistent with *AK Steel:*

> When a word is undefined in a statute, the agency and the reviewing court normally give the undefined term its ordinary meaning. *See Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). * * * Since there can be no real ambiguity about these terms, contrary to the assertions of the appellees, we are not required to do any analysis under the second part of the *Chevron* test."

226 F.3d at 1371.

Even if the SAA were controlling, the SAA does not contain a definition of "likely". Instead, the SAA attempts to provide some guidance for the inherently prospective sunset review analysis:

> The determination called for in these types of reviews is inherently predictive and speculative. There may be more than one likely outcome following revocation or termination. The possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence of dumping or countervailable subsidies, or injury, is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case.

SAA at 883. While the Commission cites to this paragraph *ad nauseam* as the "statutorily-endorsed" definition, the context of the excerpt does not suggest that it was intended as a definition but rather as a *caveat* against any presumption that the facts of a particular case can support only one outcome.[6] The Commission adamancy does not make a significant legal argument out of such nebulous matter.

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[4] The Federal Circuit itself recognized that *SKF USA Inc.* was factually unique:

> In *SKF USA Inc. v. United States,* 263 F.3d 1369, 1379–80 (Fed.Cir.2001), we resolved an apparent anomaly in the antidumping statute where the definition of a key statutory term appeared to apply solely to one part of the statute, in which the term did not even appear. Absent our interpretation applying that definition to the part of the statute in which the term actually appeared, the definition was meaningless.

FAG Italia S.p.A. v. United States, 291 F.3d 806, 817 (Fed. Cir. 2002).

[5] In *Micron,* the court did not determine that the term "level of trade" was unambiguous yet still look to the SAA for meaning. Rather, the court was explaining its understanding in the absence of a definition in either the statute or the SAA.

> Neither the statute nor the [SAA] defines the phrase "same level of trade." However, we understand the term to mean comparable marketing stages in the home and United States markets, e.g., a comparison of wholesale sales in Korea to wholesale sales in the United States. *See* 19 C.F.R. § 351.412(c)(2) ("The Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent).").

Micron, 243 F.3d at 1305.

[6] The court does not dispute that the Commission may evaluate evidence as it see fit or that different conclusions can be drawn from the same evidence.

Although the court finds that there is no basis for the ITC's difference of opinion and need not reach the second ground, intervention of the court of appeals at this stage will not advance the termination of this litigation. Quite apart from the lack of merits of the legal issue, it may ultimately be of no consequence here. The Commissioners might reach the same result under the proper standard. Further, delaying finalization of reviews is counterproduction. Staff changes, commissioners change and lack of familiarity is not likely to lead to better results.

CONCLUSION

The court finds that, because the provision at issue is clear, there is no substantial ground for a difference of opinion and further that certification will not advance disposition of this matter. Defendant's motion to certify for interlocutory appeal is hereby denied; thus stay is not warranted.

(Slip Op. 02–76)

TOY BIZ, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96–10–02291

[Plaintiff's motion for partial summary judgment denied, Defendant's cross-motion for partial summary judgment granted in part and denied in part.]

(Decided July 30, 2002)

Singer & Singh, (Sherry L. Singer and *Indie K. Singh),* for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mikki Graves Walser); Beth C. Brotman,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, Of Counsel; for Defendant.

OPINION

RIDGWAY, *Judge:* This action involves the tariff classification of dozens of action figures from various Marvel Comics series (including the X-Men, Spider-Man, and the Fantastic Four), as well as a doll sold as "Jumpsie." Plaintiff Toy Biz, Inc. ("Toy Biz") imported the merchandise from China, through the ports of Seattle and Los Angeles, in 1993 and 1994. The United States Customs Service

("Customs") classified the merchandise as "[d]olls representing only human beings and parts and accessories thereof," under subheading 9502.10.40 of the Harmonized Tariff Schedule of the United States

("HTSUS") (1993 and 1994),[1] and assessed duties at the rate of 12% *ad valorem*.[2] Toy Biz contests that classification.

The goods at issue in this opinion are the "X-Men Projectors" (Assortment No. 49110).[3] Toy Biz here contends that—even if the specific X-Men figures which house the projector mechanisms represent humans, and thus would alone be classifiable as "dolls"—the existence of the projector feature and the film disks packaged with the Projectors justify their classification as "other toys" under subheading 9503.90.60, HTSUS, or as "toy sets" under subheading 9503.70.80, HTSUS (both dutiable at 6.8% *ad valorem*).[4] *See* Complaint ¶ 30; Memorandum In Support of Plaintiff's Motion For Summary Judgment ("Plaintiff's Brief") at 8–12; Memorandum of Plaintiff Toy Biz, Inc. In Reply to Defendant's Memorandum In Opposition to Plaintiff's Motion For Summary Judgment and In Opposition to Defendant's Cross-Motion For Summary Judgment ("Plaintiff's Reply Brief") at 14–17.

This action has been designated a test case pursuant to USCIT Rule 84, and is before the Court on cross-motions for summary judgment. Jurisdiction is predicated on 28 U.S.C. § 1581(a) (1994). Customs' classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640 (1994).

For the reasons set forth herein, the Court denies the parties' cross-motions for partial summary judgment on the classification of the Projectors as "other toys" vs. "dolls" based on the existence of the projector mechanism or feature. As explained below, Customs properly ruled that the Projectors are composite goods to be classified pursuant to General Rule of Interpretation ("GRI") 3(b). However, the record before the Court is not sufficient at this time to permit a determination as to the "essential character" of the Projectors, as required by GRI 3(b).

The Court further finds, as discussed below, that the film disks packaged with the Projectors do not justify their classification as "toy sets." Accordingly, Toy Biz's motion for partial summary judgment on that issue is denied, and the Government's cross-motion is granted.

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[1] At the time the Projectors were imported, subheading 9502.10.40, in its entirety, covered "[d]olls representing only human beings and parts and accessories thereof: [d]olls, whether or not dressed: [o]ther: [n]ot over 33 cm in height." HTSUS, subheading 9502.10.40. The subheading numbers at the time of importation are used throughout this opinion.

[2] Certain action figures were packaged with "Official Marvel Universe Trading Cards," which Customs separately classified as "[o]ther printed matter, including printed pictures and photographs" under subheading 4911.99.60, dutiable at 0.4% *ad valorem*. *See* HQ 957636 (Oct. 11, 1995); HQ 957688 (Oct. 11, 1995).

[3] In *Toy Biz, Inc. v. United States ("Toy Biz I")*, 24 CIT ___, 123 F. Supp. 2d 646 (2000), the Court denied the parties' cross-motions for partial summary judgment on the classification of the action figures as "dolls" (under heading 9502) or "toys" (under heading 9503) based on their "human" vs. "non-human" characteristics. Toy Biz's motion for partial summary judgment seeking classification of the "X-Men Steel Mutants" (Assortment Nos. 49210 and 49220) and "Silver Samurai" (Assortment Nos. 4900 I and 49605–II) as toy "tin soldiers and the like" under heading 9503 was denied, and the Government's cross-motion on the same issue was granted, in *Toy Biz, Inc. v. United States*, 25 CIT ___, ___, 132 F. Supp. 2d 17, 18 (2001) (*"Toy Biz II"*). *See also Toy Biz II*, 25 CIT at ___, 132 F. Supp. 2d at 18 (noting that "the analysis [of *Toy Biz II*] applies with equal force both to the Steel Mutants packaged as dueling duos and to the Steel Mutants in the ["Kay-Bee Collectors Edition X-Men Special Metallic Edition" (Assortment Nos. 49605–I and 49605–II)]").

[4] In its entirety, subheading 9503.90.60 covered "[o]ther toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; and accessories thereof: [o]ther: [o]ther: [o]ther toys (except models), not having a spring mechanism." HTSUS, subheading 9503.90.60. Similarly, subheading 9503.70.80, in its entirety, covered "[o]ther toys; * * * [o]ther toys, put up in sets or outfits, and parts and accessories thereof: [o]ther: [o]ther." HTSUS, subheading 9503.70.80.

I. BACKGROUND

The "X-Men Projectors" at issue are colorful, poseable plastic action figures—specifically, "Cyclops," "Magneto," and "Wolverine"—each of which stands approximately seven-and-one-half inches tall, and has a built-in miniature slide projector mechanism housed in a cavity in its upper torso.[5] The projector mechanism consists of a small light bulb (powered by two AAA batteries, which are not included) behind a small lens through which images are projected. The lens of the projector protrudes markedly from the figure's chest. Packaged with each Projector are three different, interchangeable film "action disks," each of which consists of multiple "still" frames (slides) of various action scenes (resembling frames of a comic strip). *See* Sample "Bishop" and "Dr. Octopus" Projectors; Plaintiff's Brief, App. A at 10; Toy Biz 1994 Catalog at 14–15; Toy Biz 1995 Catalog at 13.

A button on the back of the Projector figure permits the user to turn on the projector's light bulb and to project one of the various images on the film disk onto any surface in front of the figure. Turning a knob on the back of the figure advances the film disk to another "frame," changing the projected image. Twisting the lens on the front of the figure focuses the image.

In classifying the "X-Men Projectors," Customs determined that each was "a composite article (consisting of a figure and a projector) with accessories (consisting of three film disks)." *See* HQ 957636 (Oct. 11, 1995); HQ 957688 (Oct. 11, 1995). Applying GRI 3(b), Customs further determined that "[e]ach article's essential character is imparted by the doll or toy animal/creature component." *Id.* Customs therefore classified the Projectors here at issue as "[d]olls representing only human beings" under subheading 9502.10.40, HTSUS. *Id.*

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[5] The Projectors at issue are three of the five items in Assortment 49110. Because samples of the "Wolverine," "Magneto" and "Cyclops" Projectors were not available, Toy Biz instead submitted samples of a "Bishop" Projector and a "Dr. Octopus" Projector.

Several of Toy Biz's submissions mistakenly refer to the "Hobgoblin" Projector—one of the "Spider-Man Projectors" (Assortment No. 47220). *See, e.g.*, Plaintiff's Statement of Material Facts For Which There Is No Issue To Be Tried ("Plaintiff's Statement of Material Facts") ¶¶ 70–71; Plaintiff's Brief at 8, App. A at 12; Plaintiff's Reply Brief at 14. *See also* Defendant's Response to Plaintiff's Statement of Material Facts For Which There Exists No Issue To Be Tried ("Defendant's Response to Plaintiff's Statement of Material Facts") ¶¶ 70–71. Similarly, Toy Biz's Complaint referred to Projectors in Assortment Nos. 47220, 48130 and 48210, as well as Assortment No. 49110. *See* Complaint ¶ 25. However, the parties now agree that the "Wolverine," "Magneto" and "Cyclops" Projectors of Assortment 49110 are the only Projectors at issue in this action. *See* generally Stipulation (filed Oct. 19, 2000) (submitted under cover of Defendant's Consent Motion to File Its Response to Plaintiff's Complaint Out of Time [sic; Consent Motion to File Stipulation Out of Time]).

In light of such errors and discrepancies in the parties' submissions, as well as the large number of items involved, the parties entered into a Stipulation identifying all items at issue in this action and superseding all prior statements on the subject. The Stipulation is annotated to reflect the parties' agreement "as to the evidence (samples, photographs and catalogs) to be considered in ruling on the pending motions for summary judgment." *See Toy Biz I*, 24 CIT at ___, 123 F. Supp. 2d at 646 n.1.

Since the Stipulation was reached, it has been clarified, and superseded in part, by several more recent developments. *See* Letter from Counsel for Toy Biz (Oct. 23, 2000) (noting that Stipulation references to "Robin Wolverine" should read "Robot Wolverine"); Affidavit of JoAnn E. McLaughlin (Oct. 23, 2000), *filed with* Plaintiff's Memorandum in Opposition to Defendant's Motion *In Limine* (same); Notice from Counsel for Toy Biz (Oct. 20, 2000) (noting submission of additional samples, as listed). In addition, Toy Biz has "abandoned its claims with regard to all of the figures in Assortment 4810F," and the Government has agreed to the classification of "Beast," "Robot Wolverine," "Cameron Hodge," and "Vulture" as "[t]oys representing animals or non-human creatures" under subheading 9503.49.00, and "Bonebreaker" as "[o]ther toys" under subheading 9503.90.00. *See* Declaration of Alice Wong ¶ 3 (April 5, 2001). *See also* Affidavit of JoAnn E. McLaughlin (May 24, 2001).

II. Standard of Review

Under USCIT Rule 56, summary judgment is appropriate where "there is no genuine issue as to any material fact and * * * the moving party is entitled to [ ] judgment as a matter of law." USCIT R. 56(c). Customs' classification decisions are reviewed through a two-step analysis—first construing the relevant tariff headings, then determining under which of those headings the merchandise at issue is properly classified. *Bausch & Lomb, Inc. v. United States,* 148 F.3d 1363, 1365 (Fed. Cir. 1998) (*citing Universal Elecs., Inc. v. United States,* 112 F.3d 488, 491 (Fed. Cir. 1997)).

Interpretation of the relevant tariff headings is a question of law, while application of the terms to the merchandise is a question of fact. *See id.* Summary judgment is thus appropriate where the nature of the merchandise is not in question, and the sole issue is its proper classification. *See id.* (it is "clear that summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is)" (citation omitted).

On the other hand, "summary proceedings are not intended to substitute for trial when it is indeed necessary to find material facts." *Scripps Clinic & Research Found. v. Genentech, Inc.,* 927 F.2d 1565, 1570 (Fed. Cir. 1991) (*citing Meyers v. Brooks Shoe, Inc.,* 912 F.2d 1459, 1461 (Fed. Cir. 1990)). Thus, it remains a function of the court to "determine whether there are any factual disputes that are material to the resolution of the action. The court may not resolve or try factual issues on a motion for summary judgment." *Sea-Land Service, Inc. v. United States,* 23 CIT 679, 684, 69 F. Supp. 2d 1371, 1375 (1999) (*quoting Phone-Mate, Inc. v. United States,* 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988)). *See also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986) (on summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). Accordingly, summary judgment must be denied where there is a "dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l, Inc. v. United States,* 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993) (*quoting Pfaff Am. Sales Corp. v. United States,* 16 CIT 1073, 1075 (1992)).

On review, Customs' classification decisions are afforded a measure of deference proportional to their power to persuade, in accordance with the principles set forth in *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). *See United States v. Mead Corp.,* 533 U.S. 218, 235 (2001); *Mead Corp. v. United States,* 283 F.3d 1342, 1346 (Fed. Cir. 2002).

III. Analysis

The General Rules of Interpretation ("GRIs") provide a framework for the classification of merchandise under the HTSUS, and are considered statutory provisions of law for all purposes. *See Orlando Food Corp. v. United States,* 140 F.3d 1437, 1439 (Fed. Cir. 1998). The *Harmonized Commodity Description and Coding System: Explanatory Notes*

(1st ed. 1986) ("Explanatory Notes") function as an interpretative supplement to the HTSUS. While the Explanatory Notes "do not constitute controlling legislative history," they "are intended to clarify the scope of HTSUS subheadings and offer guidance in interpreting its subheadings." *Mita Copystar Am. v. United States,* 21 F.3d 1079, 1082 (Fed. Cir. 1994) (*citing Lynteq, Inc. v. United States,* 976 F.2d 693, 699 (Fed. Cir. 1992)).

Most goods are classified pursuant to GRI 1, which provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions [Rules 2 through 6]." GRI 1. According to the Explanatory Notes, GRI 1 is "intended to make it quite clear that the terms of a heading and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification." Explanatory Notes at GRI 1(V). *See also Orlando Food Corp.,* 140 F.3d at 1440 ("Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise.") (citation omitted).

The relevant GRIs here are GRI 1 and GRI 3. The parties disagree as to their application to the Projectors in the cross-motions at bar.

A. Projectors as Dolls with "Parts and Accessories" vs. "Other Toys"

1. GRI 1

Although Customs classified the Projectors pursuant to *GRI 3(b)*, the Government argues for the first time here that the Projectors actually can be classified as "dolls" under heading 9502 pursuant to *GRI 1* instead.[6] *Compare* HQ 957636 (Oct. 11, 1995) *and* HQ 957688 (Oct. 11, 1995) *with* Memorandum In Support of Defendant's Motion to Dismiss and In Opposition to Plaintiff's Motion for Summary Judgment and In Support of Defendant's Cross-Motion for Summary Judgment ("Defendant's Brief") at 18–19, 24–26 *and* Memorandum In Reply to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment ("Defendant's Reply Brief") at 12–15.

Toy Biz responds that, even if the Projector figures represent humans, the Projectors cannot be classified under heading 9502, because the projector mechanism renders the Projectors "more than" dolls. *See* Plaintiff's Brief at 10–11; Plaintiff's Reply Brief at 15. Under the "more than" doctrine, created by the courts and applied in a line of cases under the Tariff Schedules of the United States ("TSUS"),[7] goods which constitute "more than" a particular article—because they possess additional significant features or perform additional nonsubordinate functions—are not classifiable as that article. *See, e.g., Digital Equip. Corp. v. United States,* 889 F.2d 267, 268 (Fed. Cir. 1989).

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[6] The Government's change of position is discussed at somewhat greater length below. *See* section III.A.2, *infra.*

[7] The TSUS is the predecessor of the HTSUS.

However, the "more than" doctrine has been subsumed by the GRIs, and therefore does not apply where—as here—classification is governed by the HTSUS. *See, e.g., JVC Co. of Am. v. United States,* 234 F.3d 1348, 1353–54 (Fed. Cir. 2000) (deciding the viability of the "more than" doctrine under the HTSUS as "an issue of first impression" and expressly "settl[ing] [it] * * * for the benefit of future adjudication of classification cases"). Accordingly, Toy Biz's reliance on the "more than" doctrine is unavailing.

That is not to say that the Government's reliance on GRI 1 is well-founded. The Government maintains that the presence of the projector mechanism is entirely compatible with the Projectors' classification as "dolls." *See generally* Defendant's Brief at 24; Defendant's Reply Brief at 12–15. The Government emphasizes that the Explanatory Notes to heading 9502 provide that the dolls classified under that heading "may be jointed and *contain mechanisms which permit limb, head or eye movements as well as reproductions of the human voice, etc.*" *See generally* Defendant's Brief at 19, 24 *and* Defendant's Reply Brief at 13–14 (*quoting* Explanatory Note 95.02, emphasis added). The Explanatory Notes further specify that "*[p]arts and accessories* of dolls of this heading include: heads, bodies, limbs, eyes * * *, moving mechanisms for eyes, *voice-producing or other mechanisms*, wigs, dolls' clothing, shoes and hats." *See* Defendant's Brief at 24 *and* Defendant's Reply Brief at 13–14 (*quoting* Explanatory Note 95.02, emphasis added).

But the Government's attempt to analogize the projector feature to mechanisms such as those "which permit limb, head or eye movements" or reproduce the human voice is in vain. The Government mistakenly characterizes the projector mechanism as "a mechanism [that] produces voices." Defendant's Reply Brief at 13–14. In fact, although some images on the film disks depict characters "speaking" via dialogue "bubbles" drawn over the heads,[8] the Projectors produce no sound whatsoever—human voice or otherwise. *See* Sample "Bishop" and "Dr. Octopus" Projectors.

Read in context, it is apparent that the "other mechanisms" referred to in the Explanatory Notes are mechanisms that contribute to a figure's lifelike human simulation. *See generally Janex Corp. v. United States,* 80 Cust. Ct. 146, 155–56 (1978) (night light function of "Raggedy Ann and Andy Nite-timers"—essentially plastic dolls housing night lights—is distinguishable from "features commonly incorporated in dolls as mechanisms that create tears, cause the arms or legs to move, produce a voicelike sound, or otherwise contribute to a lifelike simulation").

The projector mechanism cannot be said to contribute to the Projectors' lifelike human simulation. Clearly, human beings do not project film images from their chests. As Customs properly ruled, the Projectors

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[8] For example, the film disks included with the sample "Bishop" Projector depict action scenes in which "Bishop" is portrayed as exclaiming "Run, run!" and "I'll find you!" *See* Sample "Bishop" Projector (with disk).

are composite goods—consisting of two components, a figure and a projector mechanism—which cannot be classified pursuant to GRI 1.

2. GRI 3

GRI 3 governs the classification of goods—including composite goods—that are *prima facie* classifiable under two or more headings. In such cases, GRI 3 requires that:

> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the * * * composite goods * * *, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) * * * [C]omposite goods * * * made up of different components * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the * * * component which gives them their essential character * * *
>
> (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

GRI 3(a) is thus known as the rule of "relative specificity"; GRI 3(b) reflects the "essential character" test; and GRI 3(c), the default rule, provides for classification by "numerical order." The Explanatory Notes specify that these three methods of classification "operate in the order in which they are set out in the Rule," so that "Rule 3(b) operates only if Rule 3(a) fails in classification, and if both Rules 3(a) and (b) fail, Rule 3(c) will apply." Explanatory Note to GRI 3(I).

The parties agree that the Projectors are "composite goods." *See, e.g.*, Plaintiff's Reply Brief at 16–17; Defendant's Reply Brief at 13, 16 n.5, 17. However, in its briefs filed with the Court, the Government has raised for the first time an argument that GRI 3 is not applicable here because, the Government now suggests, the Projectors are not *prima facie* classifiable under two or more headings. *See* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 15–16.

The Government's new argument is premised on its view that the various potentially relevant headings are mutually exclusive. It reasons that the application of GRI 3 in such a case would violate GRI 1's mandate to classify goods "according to the terms of the headings and any relevant section or chapter notes." GRI 1. *See generally* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 15–16.

The Government points out, for example, that the Explanatory Notes state that heading 9503 captures "[a]ll toys *not included* in *headings 95.01* and *95.02*," so that heading 9503 is a "basket" (residual) provision which covers "other toys." *See* Explanatory Note 95.03(A) (emphasis in original). The Government therefore concludes that the Projectors cannot be *prima facie* classifiable under both heading 9502 (for the figure) and 9503 (for the projector mechanism), because the two headings are assertedly mutually exclusive. *See generally* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 15–16.

Similarly, the Government asserts that, since projectors are classifiable under heading 9008 (which covers "[i]mage projectors"), "the competing tariff provision[s]" for classification of the Projectors would be headings 9502 and 9008—not headings 9502 and 9503.[9] *See* Defendant's Reply Brief at 16 n.5. But again, the Government points out that Note 1(ij) to Chapter 90 excludes from classification under Chapter 90 articles that are classifiable under Chapter 95. Thus, the Government reasons, because the two provisions are mutually exclusive, the Projectors cannot be *prima facie* classifiable under both heading 9502 (for the figure) and 9008 (for the projector mechanism). *Id.*

There are at least three problems with the Government's new argument. First, it cannot be reconciled with Customs' position at the administrative level. In ruling on Toy Biz's protest, Customs clearly applied the "essential character" test of GRI 3(b) to the Projectors. Customs ruled:

> We consider each X-Men Projector to be a *composite article* (consisting of a figure and a projector) * * * Each article's *essential character* is imparted by the doll or toy animal/creature component.

HQ 957636 (Oct. 11, 1995) (emphases added). *See also* HQ 957688 (Oct. 11, 1995) (same). By the express terms of GRI 3 (as discussed above), Customs could not have reached GRI 3(b) if it had not first determined that the Projectors were *prima facie* classifiable under at least two headings.[10]

Second, the Government's precise position is less than clear. In support of summary judgment, the Government agreed with Toy Biz that "[d]efendant's position regarding the classification of the imported items [including the Projectors] is reflected in the * * * rulings issued by U.S. Customs Service," including HQ 957636 (Oct. 11, 1995) and HQ 957688 (Oct. 11, 1995)—the Customs rulings classifying the Projectors under GRI 3(b). *See* Plaintiff's Statement of Material Facts ¶ 6; Defendant's Response to Plaintiff's Statement of Material Facts ¶ 6. The Government thus seemed to endorse Customs' classification of the Projectors pursuant to GRI 3(b).

In contrast, the Government's opening brief seemed to argue unequivocally that the Projectors are not *prima facie* classifiable under

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[9] Heading 9008, HTSUS, in its entirety, covered "[i]mage projectors, other than cinematographic; photographic (other than cinematographic) enlargers and reducers; parts and accessories thereof." The related Explanatory Notes provide that the "instruments of this heading are designed for projecting still images." *See* Explanatory Note 90.08(A).

Because the parties differ in their proposed classifications for the projector component (with the Government asserting that it is properly classifiable under heading 9008, while Toy Biz asserts that it is classifiable under heading 9503), the parties also differ in their view of the competing headings for the Projector as a whole. Moreover, although the Customs rulings implicitly acknowledge the existence of two competing headings, they do not expressly identify how Customs would have classified the projector component alone. *See* HQ 957636 (Oct. 11, 1995); HQ 957688 (Oct. 11, 1995).

In any event, because the proper classification of the projector component is material (if at all) only if it is determined that the projector feature imparts to the Projectors their "essential character," the ultimate disposition of the pending motions (below) renders it unnecessary to reach the issue of the classification of the projector component at this time.

[10] *See generally* Plaintiff's Reply Brief at 14 (noting that Government's claim that GRI 3 is not applicable is "at variance with the position it has previously, repeatedly, taken," and pointing out that, at the administrative level, Customs classified the Projectors under GRI 3(b)).

Although Toy Biz takes pains to highlight the Government's apparent efforts to disavow Customs' basis for classifying the Projectors, Toy Biz has stopped short of arguing that the Government is prohibited from affirmatively espousing a theory of classification that differs so fundamentally from Customs' rationale. *Id.*

two or more headings, and therefore cannot be classified under GRI 3. *See* Defendant's Brief at 17–18, 25–26. But, even then, the brief gave no indication that the Government recognized that it was repudiating Customs' position. Indeed, the brief made no reference to the basis for Customs' classification of the Projectors, much less proffer an explanation for the apparent reversal of position, or expressly "confess error." *Id.* And the

Government's reply seemed to temper the position taken in its opening brief—appearing, at least in some places, to treat its new argument in opposition to the application of GRI 3 as an alternative or "fallback" position.[11] *Compare* Defendant's Brief at 17–18, 25–26 *with* Defendant's Reply Brief at 15–16 (where, *e.g.*, the Government asserts that its opening brief "did not depart from our prior position regarding the classification of [the Projectors] pursuant to GRI 3(b)"). Indeed, the Government's final words on the subject can be read to endorse the classification of the Projectors "based upon the essential character of the good," an argument the Government characterizes as "consistent with" GRI 3(b). *See* Defendant's Reply Brief at 17.

Finally, the Government cited no case law in support of its new "mutual exclusivity" argument, in either of its briefs. *See* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 16–17. Toy Biz reasons simply that "[w]hile it is true that a figure cannot be classifiable as both a doll and a non-human creature (toy), it does not follow that an item cannot be a composite article consisting of a doll portion and a toy portion." Plaintiff's Reply Brief at 16–17.

While, at first blush, there is a certain appeal to the seeming logic of the Government's new argument, it merits close scrutiny. *Better Home Plastics* includes what is perhaps the most thoughtful and comprehensive analysis of an argument similar to Government's "mutual exclusivity" argument here. *See Better Home Plastics Corp. v. United States,* 20 CIT 221, 916 F. Supp. 1265 (1996), *aff'd*, 119 F.3d 969 (Fed. Cir. 1997).

Better Home Plastics concerned the classification of imported shower curtain sets consisting of a textile outer curtain, an inner plastic magnetic liner, and plastic hooks. Customs had applied GRI 3(c), classifying the merchandise under subheading 6303.92.0000, HTSUS—the subheading for the textile outer curtain. In contrast, Better Home Plastics argued that GRI 3(b) controlled, and that the merchandise should be classified based on the inner plastic liner, under subheading 3924.90.1010, HTSUS.[12]

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[11] It is not clear whether or not the Government intended in its opening brief to disavow Customs' rationale for the classification of the Projectors. But the rather more muted argument in the Government's Reply may be the result of Toy Biz's Reply Brief, which cast the spotlight on the Government's change of position. Specifically, Toy Biz intimated that the Government's new antipathy for GRI 3 is a tacit acknowledgment that the proper application of GRI 3 will not sustain the classification of these Projectors as "dolls." *See* Plaintiff's Reply Brief at 14 ("Defendant, apparently recognizing the obvious result of its own earlier reasoning, has now decided to shift gears, and claim that the items are classifiable as dolls under the *eo nomine* principle.").

[12] Subheading 6303.92.0000, in its entirety, covered "[c]urtains (including drapes) and interior blinds; * * * [o]ther: [o]f synthetic fibers." HTSUS, subheading 6303.92.0000. Subheading 3924.90.1010, in its entirety, covered "[t]ableware, kitchenware, other household articles and toilet articles, of plastics: [o]ther: [c]urtains and drapes, including panels and valances; * * * [c]urtains and drapes." HTSUS, subheading 3924.90.1010.

The Government argued that classification under GRI 3(b) was inappropriate, asserting that the shower curtain sets could not be classified based on the plastic liner because certain Chapter Notes precluded classification of the sets under Chapter 39. Specifically, as the court observed:

> Note 1 to Chapter 39 provides [that] "any reference to 'plastics' * * * does not apply to materials regarded as textile materials of Section XI." Section VII, Chapter 39, Note 1, HTSUS. In addition, Note 2(a) of the same chapter provides that Chapter 39 does not cover "goods of section XI (textiles and textile articles)[.]" *Id.* at Note 2(1).

Better Home Plastics, 20 CIT at 225, 916 F. Supp. at 1268. In short, as the Court put it, the Government argued in that case—much as it has in this case—that "under GRI 1, * * * the prohibition contained in the chapter notes * * * take precedence over an application of GRI 3(b)." 916 F. Supp. at 1268. *Compare* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 15–16.

The *Better Home Plastics* court found the Government's argument unpersuasive. The court reasoned that the purpose of exclusions such as those in the Chapter Notes that the Government relied on in that case—like those that the Government cites here—is to ensure that the classification system does not yield absurd or incongruous results. *See Better Home Plastics,* 916 F. Supp. at 1268–69 (discussing Explanatory Note GRI 1(V) and observing that, absent the relevant Chapter Note, a mixture of sodium and chloride (*i.e.*, salt) would be classified as a Chapter 31 fertilizer). The court held that, in contrast:

> The application of GRI 3(b) results in the classification of a set pursuant to the component that imparts the set's essential character, * * * the plastic liner. Under this fiction, the set is to be treated as if it consists wholly of the plastic curtain.

20 CIT at 226, 916 F. Supp. at 1269. As the court explained, the very nature of the "essential character" test of GRI 3(b) ensures that it does no violence to the merchandise being classified:

> Classification of the textile curtain under the provision for plastic goods would not deprive the set of its "plastic" qualities. It is the essential character of the set—derived in part from the plastic's ability to repel water—that denotes the set's utility, purpose, and accordingly, character. Inclusion of the textile curtain with the classification for the plastic liner does little to change the qualities or the basic nature of the set in meeting this purpose.

Id.

Accordingly, the court in *Better Home Plastics* rejected the Government's argument that prohibitions (or exclusions) in Chapter Notes—such as those at issue here—precluded the application of GRI 3(b) to classify the shower curtain set at issue in that case. Applying GRI 3(b) and concluding that the "essential character" of the set was derived

from the inner plastic liner, the court held that the set was properly classifiable under Chapter 39, Chapter Notes notwithstanding.

So, too, in this case, the Chapter Notes and Explanatory Notes cited by the Government are no bar to the application of GRI 3.[13] As Customs here properly ruled, the Projectors are composite goods consisting of two components—a figure and a projector mechanism—which are *prima facie* classifiable under two or more headings. The Projectors are therefore subject to classification under GRI 3.

a. GRI 3(a)—"Relative Specificity"

While Toy Biz agrees that the Projectors are composite goods subject to GRI 3, Toy Biz contends that the Projectors can be classified under GRI 3(a). Accordingly, Toy Biz argues, Customs' resort to GRI 3(b) and its "essential character test" was improper. *See* Plaintiff's Brief at 9–11; Plaintiff's Reply Brief at 16.

Toy Biz asserts that, even if the Projector figures represent humans, the presence of the projector mechanism justifies the classification of the Projectors as "other toys" under GRI 3(a). *See generally* Plaintiff's Brief at 9–11; Plaintiff's Reply Brief at 14–17. Paraphrasing GRI 3(a), Toy Biz reasons that "[s]ince the projector and the figure portions of the [Projectors] are separately classifiable, Customs is required to classify the item under 'the heading which provides the most specific description' rather than under a heading which provides a more 'general description.'" Plaintiff's Reply Brief at 16. Toy Biz concludes that "[u]nder this principle, classification under 9503.90.60 is applicable since this provision encompasses the various features of the item, not only one feature." *Id.*

But Toy Biz ignores the express caveat to GRI 3(a)'s rule of "relative specificity." That caveat, set forth in the second sentence of the GRI 3(a), provides that where—as here—the competing headings "each refer to part only" of the composite good, "those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods." *See* GRI 3(a).

In the motions at bar, Toy Biz assumes for the sake of argument that the figure components of the Projectors would be classifiable as "dolls" under heading 9502. *See* Plaintiff's Brief at 10 ("[t]he issue of whether the figure represents a human or a non-human is irrelevant to the classification of these items"); Plaintiff's Reply Brief at 16 ("[t]he existence of the projector necessarily removes the article from classification within the doll provision [of the HTSUS], *regardless of whether the figure represents a human")* (emphasis added), 17 ("[i]f we assume, *arguendo,*

[13] Significantly, GRI 1 refers only to *Section* Notes and to *Chapter* Notes. *See* GRI 1 (classification to be determined according to terms of headings "and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [the other GRIs that follow]"). The notes of concern in *Better Home Plastics* were *Chapter* Notes, as are the notes on which the Government here relies vis-a-vis heading 9008. *See Better Home Plastics,* 20 CIT at 225–26, 916 F. Supp. at 1268; Defendant's Reply Brief at 16 n.5. However, the notes that the Government cites vis-a-vis heading 9503 are merely *Explanatory* Notes, which are not mentioned in GRI 1. *See* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 15–16. While Explanatory Notes "may offer guidance in interpreting subheadings in the HTSUS, they are not considered controlling." *Rocknel Fastener, Inc. v. United States,* 267 F.3d 1354, 1360 (Fed. Cir. 2001). In sum, while even "mutually exclusive" prohibitions in *Chapter* Notes do not bar the application of GRI 3 in cases such as this, the argument on prohibitions in *Explanatory* Notes is weaker still.

that the figures housing the projectors represent human beings, this in itself does not dictate classification as dolls") (emphasis in original). The projector feature is *prima facie* classifiable under either heading 9008 ("image projector") or heading 9503 ("other toys"). *See, e.g.*, Defendant's Reply Brief at 16 n.5 (identifying competing headings as headings 9502 and 9008); Plaintiff's Reply Brief at 14 (implicitly identifying competing headings as headings 9502 and 9503), 17 (asserting that projector alone would be classifiable under heading 9503).

Whether the competing headings are 9502 and 9503, or headings 9502 and 9008, each refers to "part only" of the Projectors. Accordingly, under GRI 3(a), the competing headings are deemed equally specific, and classification under GRI 3(b) is appropriate.[14]

b. GRI 3(b)—"Essential Character"

Customs classified the Projectors pursuant to GRI 3(b), applying the "essential character" test of that rule. Specifically, Customs concluded:

> We consider each X-Men Projector to be a composite article (consisting of a figure and a projector) with accessories (consisting of three film disks). *Each article's essential character is imparted by the doll or toy animal/creature component.*

HQ 957636 (Oct. 11, 1995) (emphasis added); HQ 957688 (Oct. 11, 1995) (emphasis added). Because the figure ("doll or toy animal/creature") components of the Projectors here at issue were determined by Customs to represent humans, Customs classified the Projectors as dolls.

The GRIs offer only the most general guidance on the interpretation of the "essential character" test. The Explanatory Notes to GRI 3(b) state simply:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Explanatory Notes to GRI 3(b)(VIII). Nor are there many reported cases on point decided under the HTSUS. Accordingly, the courts have looked to case law under the TSUS for guidance. *See Better Home Plastics Corp. v. United States,* 20 CIT 221, 224, 916 F. Supp. 1265, 1267 (1996), *aff'd*, 119 F.3d 969 (Fed. Cir. 1997).

The challenge in this case, however, is not the relative paucity of case law. Indeed, application of the "essential character" test is, by definition, a fact-intensive analysis. *See, e.g., Takashima U.S.A., Inc. v. United States,* 16 CIT 1030, 1037, 810 F. Supp. 307, 313 (1992) (referring to "a fact-intensive 'essential character' analysis"); *Canadian Vinyl Indus., Inc. v. United States,* 76 Cust. Ct. 1, 2, 408 F. Supp. 1377, 1378 (1976) (noting that "[d]iscernment" of "essential character" is not "an

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[14] Significantly, Toy Biz has pointed to no case where composite goods which were *prima facie* classifiable under two or more headings were classified pursuant to GRI 3(a). Indeed, independent research suggests that there is no such case.

exact science"), *aff'd*, 555 F.2d 806 (CCPA 1977). The challenge here is that Customs failed to elaborate on the rationale for its determination that the figure component imparted to the Projectors their "essential character"; and the parties' briefs are virtually silent on the subject as well.

As discussed above, the Government argued that GRI 3 was not applicable, because the Projectors were classifiable under GRI 1. *See* Defendant's Brief at 24–25; Defendant's Reply Brief at 12–15. And Toy Biz argued that GRI 3(b) was not applicable, because the Projectors were classifiable under GRI 3(a). *See* Plaintiff's Brief at 9–12; Plaintiff's Reply Brief at 14–17. In short, the record in this case is virtually devoid of much of the type of argument and evidence generally considered in applying the "essential character" test.[15] While representative samples of the merchandise are available, and while they are indeed "potent witnesses" (*see, e.g., Simod Am. Corp. v. United States*, 872 F.2d 1572 (Fed. Cir. 1989)), it seems ill-advised to decide this issue without the benefit of submissions from the parties. *See, e.g., Golding Bros. v. United States*, 6 CIT 118, 121 (1983) (denying cross-motions for summary judgment and declining to determine "essential characteristic" of merchandise on incomplete record consisting of "shallow affidavits and * * * laboratory reports"), *dismissed upon receipt of further evidence*, 9 CIT 48 (1985).

Accordingly, to the extent that the parties' cross-motions seek partial summary judgment on the argument that the existence of the projector component alone is sufficient to warrant the Projectors' classification as "other toys" under heading 9503, those motions are denied. Further proceedings will be scheduled, as appropriate.

B. Projectors as "Toy Sets"

Toy Biz argues in the alternative that, even if the Projectors represent humans, and even if it is the figure component—and not the projector feature—that gives the Projectors their "essential character," the Projectors nevertheless are classifiable as "[o]ther toys, put up in sets or outfits" ("toy sets"), under subheading 9503.70.80, HTSUS. *See* Plaintiff's Brief at 11.

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[15] In addition to the representative factors set forth in the Explanatory Notes to GRI 3(b)—"the nature of the material or component, its bulk, quantity, weight or value, * * * [and] the role of a constituent material in relation to the use of the goods," *Better Home Plastics* listed some other factors to be considered in determining "essential character," including the respective indispensability of the properties of the components of the merchandise, the respective cost of the components of the merchandise, the basis for a consumer's decision to purchase the merchandise, the respective duration and/or frequency of the use of the components, and the manner in which the merchandise is invoiced. *See* Explanatory Notes to GRI 3(b)(VIII); *Better Home Plastics*, 20 CIT at 224–25, 916 F. Supp. at 1267–68. Other decisions have considered factors such as the manner in which merchandise is marketed and advertised. *See, e.g., Dominion Ventures, Inc. v. United States*, 10 CIT 411, 413 (1986), and authorities cited there. The record in this case is essentially barren of evidence on such factors.

Clearly, the figure component of the Projector constitutes the "bulk" of the item, in terms of sheer mass. *See* Sample "Bishop" and "Dr. Octopus" Projectors. On the other hand, Toy Biz emphasizes—albeit in another context—that the articles are called "Projectors" and that the word "Projector" is prominently displayed on the packaging of the merchandise. *See* Plaintiff's Brief at 9; *see also* Sample "Bishop" and "Dr. Octopus" Projectors (in packaging). But those factors alone are not dispositive. The Government asserts—although, again, in another context—that the Projector figure retains its play value even if the projector feature is inoperable or broken. *See* Defendant's Reply Brief at 15. But the reverse is true as well: The projector feature—which is housed in the Projector's torso—would still be usable even if the Projector figure were decapitated and dismembered. Additional evidence and argument are needed to decide this issue.

The Explanatory Notes define a "set" as "two or more different types of articles (principally for amusement), put up in the same packing for retail sale without repacking. Simple accessories or objects of minor importance intended to facilitate the use of the articles may also be included." Explanatory Notes at Subheading 9503.70. *See* Explanatory Notes 95.03(A) (listing examples of toy sets, including "toy arms, tools, gardening sets, tin soldiers, etc." and referring to "[c]ollections of articles, the individual items of which if presented separately would be classified in other headings").

It is not clear from the briefs whether Toy Biz is claiming as a "set" the Projectors themselves (consisting of both a figure and a projector), or the Projector together with the three film disks with which each is packaged. Neither argument has merit.

The Government assumes that Toy Biz is claiming that the Projector is a "set," in and of itself, and makes short work of the theory. *See* Defendant's Brief at 26. As the Government correctly observes, under the definitions and examples of sets in the Explanatory Notes, a Projector itself cannot be considered a "set," but is rather a single composite item consisting of two different components (a figure and a projector). *Id.*

The better argument for Toy Biz is that the Projectors, together with the film disks, constitute a set. But, as Customs ruled, the film disks in fact are mere "accessories." *See* HQ 957636 (Oct. 11, 1995); HQ 957688 (Oct. 11, 1995).

Note 3 to Chapter 95 provides that "accessories which are suitable for use solely or principally with articles of this Chapter are to be classified with those articles." Note 3 to Section XX, Chapter 95. Because the HTSUS does not define the term "accessory," it is accorded its common and popular meaning. *See, e.g., Rollerblade, Inc. v. United States,* 282 F.3d 1349, 1352 (Fed. Cir. 2002). A standard dictionary definition of "accessory" is "a thing of secondary or subordinate importance." *Merriam Webster's Collegiate Dictionary* 7 (10th ed. 1997).

An examination of the film disks packaged with the Projectors makes it clear that they are "accessories" within the dictionary definition of that term. The film disks are designed and sized specifically to fit inside the miniature projector housed within the Projector figure. The film disks are therefore "suitable for use solely or principally" with the accompanying Projector. Note 3 to Section XX, Chapter 95. Further, the film disks have no play value independent of the Projector, and are of secondary or subordinate importance.

Accordingly, contrary to Toy Biz's assertions, the inclusion of film disks with the Projectors does not convert the Projectors into "toy sets." Customs properly treated the film disks as "accessories," which are to be classified with the Projectors. Toy Biz's motion for partial summary judgment classifying the Projectors as "toy sets" is therefore denied, and the Government's cross-motion is granted.

IV. CONCLUSION

For the reasons set forth above, the Court denies the parties' cross-motions for partial summary judgment on the argument that the existence of the projector mechanism is alone sufficient to warrant the Projectors' classification as "other toys" under subheading 9503.90.60, HTSUS. In addition, Toy Biz's motion for partial summary judgment classifying the Projectors as "toy sets" under subheading 9503.70.80, HTSUS is denied, and the Government's cross-motion on that issue is granted.

A separate order will be entered accordingly.

(Slip Op. 02–77)

CARPENTER TECHNOLOGY CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

VIRAJ IMPOEXPO LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 00–09–00447

[Antidumping duty review determination sustained in part, reversed and remanded in part.]

(Decided July 30, 2002)

Collier Shannon Scott, PLLC, (Robin H. Gilbert), Washington, D.C., for the plaintiff Carpenter Technology Corporation.

Miller & Chevalier (Peter Koenig), Washington, D.C., for the plaintiff Viraj Impoexpo Ltd.

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OPINION

MUSGRAVE, *Judge:* Carpenter Technology Corporation ("Carpenter") and Viraj Impoexpo Ltd. ("Viraj") brought separate lawsuits to contest certain aspects of *Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review and Initiation of Antidumping New Shipper Review,* 65 Fed. Reg. 48965 (Aug. 10, 2000) *("Final Results").*[1] The *Final Results* utilize Viraj's reported data except for U.S. sales for which lacking corresponding third-country sales data, for which the office of International Trade Administration, U.S. Department of Commerce ("Commerce" or "the Department") utilized "facts otherwise available" to determine the margin of dumping. *See* 19 U.S.C.

[1] The official public and confidential records are herein abbreviated "PDoc" and "CDoc", respectively.

§ 1677e. Carpenter contests Commerce's reversal of its preliminary determination that Viraj's questionnaire responses warranted an adverse inference and also its model matching methodology. Viraj contests Commerce's resort to facts available and also its choice thereof. Commerce contends the *Final Results* are correct.

BACKGROUND

Viraj's stainless steel bar entered the United States commerce subject to *Antidumping Duty Orders: Stainless Steel Bar from Brazil, India and Japan*, 60 Fed. Reg. 9661 (Feb. 25, 1995). The *Final Results* cover the period February 1, 1998 through January 31, 1999 ("POR") and were initiated on March 29, 1999.[2] Commerce sent to Viraj the department's standard questionnaire requesting *inter alia* information on the home market values of merchandise under review. *See* PDoc 950. The questionnaire referred a respondent to an attached Appendix III, which specified that hot rolled ("black") stainless steel bars as well as cold rolled ("bright") bars were reportable.

In its first response(s), dated June 3, 1999 and July 12, 1999, Viraj indicated that it had not made home market sales of certain merchandise under review and therefore it was providing only data on third country sales. PDocs 978, 1267. Specifically, in several places Viraj indicated that it was reporting sales of bright bars as the only merchandise under review that had been sold in the United States during the POR. Commerce therefore sent Viraj a supplemental questionnaire on August 17, 1999 requesting confirmation that Viraj had reported all home market sales of all merchandise under review as described in Appendix III of the initial questionnaire. *See* PDoc 1062. On September 23, 1999, Viraj confirmed that it had properly reported all sales of the merchandise under review in the United States, the home market, and third country markets. Viraj again stated that it was reporting "all sales of the subject merchandise as the total stainless steel bright bars activity." PDoc 1291.

Not convinced, Commerce therefore issued a second supplemental questionnaire on January 18, 2000. PDoc 1219. This instructed Viraj to "reconfirm that [it is] reporting all sales of stainless steel bars (*not just bright bars*) * * * to the United States, the home market, and to third countries" and set a deadline of February 1, 2000 for responding. *Id.* (at Fr. 2) (highlighting added). On January 24, 2000, Viraj requested an extension of time, which Commerce granted to February 8, 2000 with the caveat that in view of the pending deadline for the preliminary determination, no further extension of time would be granted. PDocs 1232, 1238. Viraj submitted data disclosing home market sales of black bar on February 8 and 9, 2000 (PDocs 1287, 1289), however it submitted the narration for the data on February 14, 2000. Commerce rejected that submission as untimely and excluded it from the administrative record on February 17, 2000. *See* PDoc 1552.

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[2] 64 Fed. Reg. 14860 (Mar. 29, 1999). The proceeding was later combined with a new shipper review. *See* 64 Fed. Reg. 18601 (Apr. 15, 1999).

On March 8, 2000, Commerce published the preliminary results *sub nom. Stainless Steel Bar From India; Preliminary Results of Antidumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review,* 65 Fed. Reg. 12209 (Mar. 8, 2000). Commerce determined that because Viraj's last response was not timely, it had not responded to the best of its ability, it had therefore failed to cooperate, and it was therefore necessary to assign a margin based on total adverse facts otherwise available.[3] *Id.* at 12210. *See* 19 U.S.C. § 1677e. The preliminary margin was 21.02 percent.

On April 28, 2000, Viraj filed comments on the preliminary results. PDoc 1379. Viraj explained to Commerce that information provided by its counsel showed Commerce authorizing other respondents to exclude sales of black bar, and it thought that such exception applied to it because it had not sold black bar in the United States. Because the correspondence from Commerce to other parties indicated that black bar was fundamentally different from bright bar, Viraj explained that it concluded that black bar was not a "foreign like product" or "comparable" to the only "subject merchandise" it had sold in the United States, *i.e.*, bright bar. Viraj stated that it had clearly explained in its earlier responses that it was only reporting sales of bright bar and never intended to mislead Commerce. It also explained that the narrative response to its second supplemental response was submitted after the deadline due to the short time available to respond and the time pressures on the one person capable of compiling the information for the response. Additionally, Viraj argued that even without the narrative the data were sufficiently complete to enable comparison to U.S. sales. *Id.*

In the final determination, Commerce again declined consideration of Viraj's home market data on the ground that the narrative response had not been submitted by the required deadline. Nonetheless, Commerce determined that Viraj's responses had been "due to confusion and not lack of cooperation" and therefore reversed its earlier conclusion that the circumstances warranted an adverse inference. Commerce then determined that Viraj's reported foreignmarket sales were sufficiently complete to serve as a basis for comparison to U.S. sales. It grouped stainless steel bar by the physical characteristics of type (hot- or cold-rolled), grade, remelting process, final finish, and shape. Because Commerce determined that Viraj did not report complete variable cost of manufacturing information, for size it "banded" the foreign market sales based on whether bar was above or below 20 millimeters, in accordance with Viraj's reported cost of manufacturing information. Commerce then matched sales, and for unmatched U.S. sales Commerce

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[3] According to the February 28, 2000 facts available memorandum:

> no description of any product characteristics was given; no answers to our questions about customer product codes, relationships, or channels of distribution were provided; no explanation of the invoicing system was offered; and no indication were [*sic*] given as to the basis for determining date and terms of payment. Furthermore, Viraj offered no explanation for why it did not provide credit expense data, variable cost of manufacturing data, or any selling expense information. Nor did Viraj provide any explanation as to why it did not provide a narrative response to questions regarding its policies relating to the use of discounts, rebates, and interest revenue.

PDoc 1329 at 4.

utilized as facts available the "all-others" rate of 12.45% established at the original less than fair value ("LTFV") investigation in 1994. *See Stainless Steel Bar From India*, 59 Fed. Reg. 66915 (Comment 1) (Dec. 28, 1994). This resulted in a weighted-average margin of dumping of 2.50 percent for Viraj during the POR. 65 Fed. Reg. at 48967–68 (Aug. 10, 2000).

DISCUSSION

Jurisdiction over this matter is pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) via 28 U.S.C. § 1581(c). The standard of review is whether "any [contested] determination, finding or conclusion" found by Commerce is "unsupported by substantial evidence on the record, or is otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *E.g., Mitsubishi Heavy Indus. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) via *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

In an administrative review of an antidumping duty order, Commerce is required to determine the applicable antidumping duty margin, if any, for each entry of "subject merchandise." 19 U.S.C. § 1675(a)(2)(A). The margin is the difference between the "normal value" ("NV") and the "export price" ("EP") or "constructed export price" ("CEP)" (as applicable) of the subject merchandise. 19 U.S.C. § 1677b(a). Subsection (1) of section 1677b(a) provides that the NV of such subject merchandise "shall" be a

> (B) Price
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> * * * * * * *
>
> (i) * * * at which the foreign like product is first sold (or in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the [EP] or [CEP], or
>
> (ii) in a case to which subparagraph (C) applies, the price at which the foreign like product is so sold (or offered for sale) for consumption in a country other than the exporting country or the United States, if—
>
> (I) such price is representative,
>
> (II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States, and
>
> (III) [Commerce] does not determine that the particular market situation in such other country prevents a proper comparison with the export price or constructed export price.

(C) Third Country Sales

This subparagraph applies when—

(i) the foreign like product is not sold (or offered for sale) for consumption in the exporting country as described in subparagraph (B)(i),

(ii) [Commerce] determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with sales of the subject merchandise to the United States, or

(iii) the particular market situation in the exporting country does not permit a proper comparison with the [EP] or [CEP].

For purposes of clause (ii), the aggregate quantity (or value) of the foreign like product sold in the exporting country shall normally be considered to be insufficient if such quantity (or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

19 U.S.C. § 1677b(a)(1). If necessary information is missing from the administrative record, Commerce must make a determination on the basis of available information pursuant to 19 U.S.C. § 1677e, which provides in relevant part:

(a) In general

If—

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

* * * * * * *

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

[Commerce] * * * shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

(b) Adverse inferences

If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—

(1) the petition,

(2) a final determination in the investigation under this subtitle,

(3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
(4) any other information placed on the record.

19 U.S.C. § 1677e. *See also* 19 C.F.R. §§ 351.221, 351.308 (2000).

I

Carpenter contends the record lacks substantial evidence to support the determination that Viraj had acted to the best of its ability. It argues that Viraj, having participated in prior proceedings, was "well-acquainted" with departmental procedures and the contents of the agency's standard questionnaire, and it contends that Commerce violated departmental policy by not considering the three factors it generally considers in determining whether to apply adverse facts available: (1) the level of experience of the respondent in other investigations and orders; (2) whether the respondent has control of the data at issue; and (3) the extent to which the respondent may have benefitted from its own lack of cooperation. *See* Def.-Int.'s Br. at 19–26 (citing *inter alia Stainless Steel Sheet and Strip Coils from Taiwan*, 64 Fed. Reg. 30592 (June 8, 1999) (final LTFV determination); *Roller Chain Other Than Bicycle, From Japan*, 62 Fed. Reg. 60472, 60477 (Nov. 10, 1997) (final review results); *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 62 Fed. Reg. 53808, 53820–21 (Oct. 16, 1997) (final review results)). Carpenter argues for remand and consideration in accordance with Commerce's own policy.

Assuming *arguendo* that the foregoing amounts to administrative policy, the Court can discern nothing of record to justify remand for such consideration. The generic experience of a respondent in prior proceedings offers little, if any, insight into its actions during a particular proceeding. *Nippon Steel Corp. v. United States*, 25 CIT ____, ____, 146 F. Supp. 2d 835, 839 (2001). The second and third factors are predicated on finding a lack of cooperation. None has been determined, and there is no indication that Viraj intended to or did benefit from withholding information. Moreover, 19 U.S.C. § 1677e(b) is permissive in scope. *See Hoogovens Steel BV v. United States*, 24 CIT ____, ____, 86 F. Supp. 2d 1317, 1332 (2000). Therefore, even if Viraj had not acted to the best of its ability the law does not compel an adverse inference.

Of course, clear communication is prerequisite to avoiding confusion. *Cf.* 19 U.S.C. §§ 1677m(c) & 1677m(d). In this matter, Commerce sought the same information three times. But the apparent need for the second supplemental questionnaire would have been obviated had Commerce specifically requested confirmation in the first supplemental questionnaire of whether Viraj had reported all home market sales *including black bar*. On the other hand, the fact that Commerce sought confirmation *at all* (*i.e.*, whether all home market sales had been reported) should have acted as a red flag to Viraj regarding its reporting of home market sales.

The purposes of the antidumping laws are not furthered by erroneous assumption. Time is a precious commodity in these administrative pro-

ceedings. If a request from Commerce is unclear, it is incumbent upon parties to assist the administrative process and clarify the precise information sought. *See* 19 U.S.C. §§ 1675(a)(3)(A) & 1675(c)(5); *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556, 1560 (Commerce is dependent upon the cooperation of respondents to provide necessary information in order to determine dumping margins "within the extremely short statutory deadlines which the Congress has built into the * * * antidumping law"); *Persico Pizzamiglio, S.A. v. United States,* 18 CIT 299, 304 (1994) ("any ambiguity should have been resolved through consultation with Commerce before the time * * * the response was due"); *Sugiyama Chain Co. v. United States,* 16 CIT 526, 531, 797 F. Supp. 989, 994 (1992) ("if the burden of compiling, checking, rechecking, and finding mistakes in [a] submission * * * were placed upon Commerce, it would transform the administrative process into a futility").

In any event, the standard of review is whether there is substantial record evidence to support the agency's determination that Viraj had acted to the best of its ability. There is, namely: (1) the letter from Commerce to counsel exempting Isibars from reporting black bar sales, on which Viraj claims to have relied, (2) the generality of the first supplemental questionnaire request, (3) Viraj's reiteration of its original response that it was reporting "all sales of the subject merchandise as the total stainless bright bars activity,"[4] and (4) Viraj's general diligence and responsiveness to Commerce's requests for information. *See* PDoc 1477 (Comment 4). *See also* PDocs 1219, 1379 at 2. Given the context, Commerce could reasonably conclude that Viraj had been confused as to its reporting requirements, and that even considering the late narrative Viraj had been responsive. The determination that Viraj had acted to the best of its ability is therefore sustained. *See Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966) (the possibility of drawing inconsistent conclusions from the same "evidence does not prevent an agency's finding from being supported by substantial evidence"); *Inland Steel Industries, Inc. v. United States,* 188 F.3d 1349, 1359 (Fed. Cir. 1999) (reviewing courts do not weigh the evidence to determine whether a different conclusion is possible).

II

Viraj spends much of its brief criticizing Commerce's decision to reject the narrative as untimely and disregard the home market data and base normal values (NVs) on third country sales. At the same time, however, Viraj complains of being forced to respond to a six-page, single-spaced document in a mere two weeks, albeit with a one-week extension. The second supplemental questionnaire was a consequence of the nonspecific request in the first supplemental questionnaire to confirm that all home market sales had been reported, which Viraj contends was inadequate notice "of the nature of the deficiency" in accordance with 19 U.S.C. § 1677m(d), particularly in light of awareness of the exemption

[4] PDocs 1267, 1291 at 2.

"granted" to other respondents from reporting black bar sales in the home market on the ground that they had sold only bright bar in the U.S. market. Viraj further contends that because its situation was the same as those other respondents, in light of their exemptions the reporting requirement imposed on it was arbitrary and capricious. Viraj's Br. at 5.

The judicial standard of review in a challenge such as this is whether the determination *on the record* is unsupported by substantial evidence or not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1995). Of course, an agency record that reveals an arbitrary or capricious decision would not be in accordance with law, but that inquiry is narrower than the substantial evidence standard and asks whether there was a rational basis in fact for the decision. *Suwanee Steamship Co. v. United States,* C.D. 4708, 79 Cust.Ct. 19, 23–24, 435 F.Supp. 389, 392 (1977). If so, a court may not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 43 (1983). *See, e.g., Melamine Chemicals, Inc. v. United States,* 732 F.2d 924, 933–34 (1984) ("Commerce's decision to disregard margins caused solely by temporary fluctuations in the exchange rate, and to reach a Final Negative Determination, was reasonable and neither arbitrary nor in violation of law."); *Bowe Passat v. United States,* 17 CIT 335, 338 (1993) (decision to reject supplemental information arbitrary and capricious and an abuse of discretion). *See also* 5 U.S.C. § 706(2)(A).

As a general matter "it is Commerce, not the respondent, that determines what information is to be provided for an administrative review." *Ansaldo Componenti, S.p.A. v. United States,* 10 C.I.T. 28, 37, 628 F. Supp. 198, 205 (1986). The government here distinguishes Commerce's treatment of Viraj on the ground that those other respondents specifically requested an exemption whereas Viraj did not. But, of course, Commerce may neither abrogate its statutory mandate to inquire into all matters that may bear on the margin calculation nor engage in partiality. By exempting respondents with no sales of black bar in the United States from reporting home market sales of such, Commerce obviously concluded that home market black bar information was not necessary for calculating their NVs in accordance with 19 U.S.C. § 1677b(a)(1). Whether that decision was correct, Commerce was aware that Viraj had sold only bright bar in the U.S. market, and that circumstance necessarily superseded the mandate to use facts otherwise available "if an interested party or any other person * * * fails to provide such information by the deadlines for submission of the information or in the form and manner requested" under 19 U.S.C. § 1677e(a)(2)(B). Respondents have a right to expect fair, impartial, and consistent treatment in agency proceedings. *See, e.g., NEC Corp. v. U.S. Dep't of Commerce,* 151 F.3d 1361 (1998); *Melamine Chemicals v. United States,* 732 F.3d 924, 933 (1984); *Torrington Co. v. United States*, 44 F.3d 1572, 1579 (1995). It was incumbent upon Commerce to apply its rationale to all respondents similarly situated.

Be that as it may, in view of the fact that Viraj limited its initial response to third country sales data at the outset of the proceeding, it appears that Viraj's fundamental concern is the margin calculated on the basis of facts otherwise available, and that the basis of market data used to calculate NV is immaterial to Viraj. The foregoing therefore appears to be academic.

III

A margin determination requires the identification of the "foreign like product" used for purposes of comparison. *See* 19 U.S.C. § 1677(16). In comparing the foreign and U.S. merchandise, if a difference in price is "established to the satisfaction of the administering authority to be wholly or partly due to * * * other differences in the circumstances of sale[,]" 19 U.S.C. § 1677b(a)(6)(C) authorizes Commerce to make a so-called difference in merchandise ("difmer") adjustment. In considering any such adjustment, Commerce proceeds on the assumption that variable costs of manufacturing account for all differences in the physical characteristics of the products to be compared:

> In deciding what is a reasonable allowance for differences in physical characteristics, the Secretary will consider only differences in variable costs associated with the physical differences. Where appropriate, the Secretary may also consider differences in the market value. The Secretary will not consider differences in cost of production when compared merchandise has identical physical characteristics.

19 C.F.R. § 351.411 (1998). If the value of the difmer exceeds 20 percent of the total manufacturing costs (variable plus fixed costs), Commerce will presume that products are not comparable in the absence of circumstances that would make such difference reasonable. *See Antidumping Manual,* Ch. 8 at 49–52 (U.S. Dep't of Comm., Feb. 10, 1998); *see also Import Administration Policy Bulletin* 92.2 (U.S. Dep't of Comm., July 29, 1992).

Commerce concluded that Viraj provided total cost of manufacturing data but incomplete variable cost of manufacturing ("VCOM") data. Commerce therefore determined to resort to facts otherwise available for such VCOM data, and its method of accounting for such was to "band" (to use the parties' term) foreign-market and U.S.-export sales based on Viraj's representation that production processes differed between bar of less than 20 millimeters and bar greater than 20 millimeters. *See* CDoc 1266 at D–3; CDoc 1290 at D–14.

Carpenter believes size matters. It argues that there is a fundamental difference between banding sales and banding manufacturing costs, and that without VCOM data, third-country and U.S. sales could not be properly matched. The effect of the methodology, Carpenter contends, was to assign identical product matches irrespective of actual bar size:

> In cases where the Department has allowed averaging of cost data for VCOM, that decision only determined the magnitude of the DIFMER when a match between non-identical U.S. and foreign

> products occurs. Banding sales together by size range actually changes the manner by which sales are matched. Instead of seeking to match 15 mm prices in the U.S. to 15 mm prices in the third-country market, the Department has allowed a 15 mm product in the United States to match a 5, 8, 12, 16, or 19 mm product in the foreign market. Thus, the specific price differences are obviated and the most accurate possible measure of dumping is masked.

Def.-Int.'s Reply Br. at 7, 11. Thus, according to Carpenter, Commerce's method had the effect of masking differences in Viraj's cost of production and "rewarding" Viraj because Commerce could not make the requisite difmer adjustments.

The government responds that the question here is simply whether Commerce has reasonably met the requirements of 19 U.S.C. § 1677b(a)(6)(C) to account for the absence of VCOM information. It contends that Carpenter's argument assumes that Commerce's method is distorted without evidence thereof. Rather, according to the government, the data Viraj supplied enabled calculation of all legally-mandated adjustments to NV under 19 U.S.C. § 1677b(a)(6) (*e.g.*, inland freight, insurance, brokerage) and accounted for five out of the six physical characteristics that Commerce customarily uses in matching these products (type, grade, remelting process, final finish, and shape). Def.'s Br. at 33. *See* CDoc 1266 at B8–B10. According to the government, the lack of precise VCOM information affected only the comparability of size, which impacted the "customary" adjustment for "any other differences." *See* 19 U.S.C. § 167b(a)(6)(C)(ii).

Commerce has implicit authority to develop and apply reasonable model-matching methodologies in order to determine a relevant "foreign like product" under 19 U.S.C. §§ 1677b and 1677(16), and its statutory interpretation thereof is entitled to *Chevron* deference.[5] *See, e.g., NTN Bearing Corp. v. United States,* 26 CIT ____, ____, 186 F. Supp. 2d 1257, 1302 (2002). *See also Koyo Seiko Co. v. United States,* 66 F.3d 1204, 1209–10 (Fed. Cir. 1995) ("Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield 'such or similar' merchandise"); *Timken v. United States*, 10 CIT 86, 98, 630 F. Supp. 1327, 1338 (1986). On the other hand, the methodology chosen must comport with law and the standards of substantial evidence and reasonableness. *See* 19 U.S.C. § 1516a; *see, e.g., Allied Tube & Conduit Corp. v. United States,* 132 F. Supp. 2d 1087, 1096 (CIT 2001) (rejecting Commerce's unreasoned reliance on simple average in lieu of more accurate weighted average in non-adverse facts available context); *Mannesmannrohren-Werke AG et al. v. United States*, 24 CIT ____, ____, .) F. Supp. 2d 1075, 1088–89 (2000) (Commerce's use of average facts available methodology upheld in absence of evidence that a more specific methodology would be more accurate); *Koenig & Bauer-Albert AG, et al. v. United States*, 22 CIT 574, 581–584, 15 F. Supp. 2d

[5] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

834, 844–46 (1998) (Commerce's use of a facts otherwise available methodology upheld because the methodology bore a rational relationship to the subject matter at issue), *aff'd in part, rev'd on other grounds*, 259 F.3d 1341 (Fed. Cir. 2001); *Federal-Mogul Corp. et al. v. United States*, 18 CIT 785, 807–808, 862, F. Supp. 384, 400 (1994) (Commerce has discretion in the choice of methodology as long as the chosen methodology is reasonable and its conclusions are supported by substantial evidence on the record).

Carpenter's analysis demonstrates that Commerce's method matched more sales than would have been the result had resort to facts otherwise available occurred after a determination on model matching, but that analysis does not, in itself, demonstrate that Commerce's method was unreasonable and not in accordance with law. As above noted, a difmer adjustment is required to the extent that a difference in price is "established *to the satisfaction of* the administering authority to be wholly or partly due to * * * other differences in the circumstances of sale[.]" 19 U.S.C. § 1677b(a)(6)(C) (highlighting added). Carpenter's argument does not effectively demonstrate that differences in VCOMs (assuming they exist) among the different individual sizes of stainless steel bar were of such magnitude that they would exceed the difmer test's twenty percent allowance before incomparability is presumed. In other words, Carpenter's argument does not demonstrate that Commerce's method of accounting for the absence of VCOM information for matching purposes was *per se* unreasonable and therefore not in accordance with law. *Cf. Koyo Seiko*, *supra*, 66 F.3d at 1208–11 (sum-of-deviations without ten percent cap model matching methodology sustained); *Makita Corp. v. United States*, 21 CIT 734, 974 F. Supp. 770, 779 (1997) (Commerce has authority to pool home market merchandise for matching purposes); *Federal-Mogul Corp. v. United States*, 20 C.I.T. 234, 248–49, 918 F. Supp. 386, 400 (1996); *Torrington Co. v. United States*, 19 CIT 403, 414, 881 F. Supp. 622, 635 (1995) (sustaining family model matching methodology); *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 996, 834 F. Supp. 413, 417–18 (1993) (division of alloys into groups, difmer adjustments based on London Metal Exchange prices of copper and zinc for each grade within each group, and derivation of weighted-average group price as the basis for comparison, held to be in accordance with 19 U.S.C. 1677(16); exact alloy matching not required by statute).

On the other hand, Carpenter points out that the issues and decision memorandum states that Commerce undertook banding "in order to obtain more identical matches." PDoc 1466 at 13. This explanation appears results-oriented. In *Hyster Co. v. United States*, 18 CIT 119, 127, 848 F. Supp. 178, 185–86 (1994), the court examined seemingly similar statements of Commerce[6] relating to an announced change in matching methodology but concluded that there were other factors putting those

[6] *See Hyster*, 18 CIT at 127, 848 F. Supp. at 185–86 ("Our main concern is that we find the most similar merchandise that is sold in commercial quantities in the home market[.] This approach appears to be a reasonable solution in that it simplifies the matching process and creates the likelihood of a greater number of matches").

statements into perspective and were not *the* justification for the change in Commerce's model matching methodology. While an agency determination might be sustained despite "less than ideal clarity if the agency's path may be reasonably discerned[,]" *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974), the "path" here is cluttered by apparent disparate treatment between Viraj and Panchmahal, the latter, as Carpenter points out, having been required to provide for matching purposes cost data in *range* form and specific product sizes but penalized for not providing cost information to enable *exact*-size product matching. *See* Def.-Int.'s Br. at 11–12 (citing PDoc 1466 at 2–7 & CDoc. 1284). This Court therefore cannot conclude that the *Final Results* do not reflect a desire to produce a particular result, and the matter requires remand for clarification and, as necessary, reconcilation.

IV

Under prior law, when considering a non-adverse (or "second tier") facts otherwise available situation, Commerce would ordinarily use the higher of the original LTFV margin determined for the respondent's merchandise or the highest calculated margin during the review at issue for the same class or kind of merchandise. *See, e.g., Koyo Seiko Co. v. United States*, 92 F.3d 1162, 1167 (Fed. Cir. 1996). In this proceeding, because Viraj was not a party to the original LTFV investigation, Commerce utilized as non-adverse facts otherwise available the LTFV all-others rate, a weighted-average of a verified margin of 3.87% found for Grand Foundry, a cooperative respondent, and a derived margin based on the petitioner's allegations of 21.02% determined against Mukand, an uncooperative respondent. Because that rate was based on adverse inferences, Viraj argues that its use impermissibly perpetuated pre-URAA law[7] and violated an international obligation of the United States.[8]

The government essentially argues that the URAA requires only prospective determination of non-adverse all-others rates, a position it contends is in accordance with judicial precedent that all-others rates are valid and unalterable until such time as they are specifically invali-

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[7] The underlying LTFV investigation was initiated on January 27, 1994 and decided on December 28, 1994. *See* 59 Fed.Reg. 3844 and 59 Fed.Reg. 66915. On January 1, 1995 section 219(b)(2) of the URAA went into effect:

> For purposes of preliminary and final LTFV determinations the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 1677e of this title.

19 U.S.C. § 1673d(c)(5)(A). *See* 19 U.S.C. § 1677e.

[8] Viraj's Br. at 3 (citing *Federal Mogul Corp. v. United States*, 93 F.3d 1572, 1581 (Fed. Cir. 1995) ("[S]tatutes should not be interpreted to conflict with international obligations."). Viraj notes that the URAA sought to bring U.S. law into compliance with the United States' WTO obligations, including the provision on permissible all-others rates. *See Ferro Union Inc. v. United States*, 23 CIT 178, 197, 44 F. Supp. 2d 1310, 1328 (1999). Article 9.4 of the WTO Antidumping Duty Agreement, reflected in 19 U.S.C. § 1673d(c)(5)(A), states that

> any antidumping duty applied to imports from exporters or producers not included in the examination [*i.e.* an all-others rate] shall not exceed the weighted average dumping margin with respect to the selected exporters or producers. * * * Provided that the authorities shall disregard for purposes of this paragraph any zero and *de minimis* margins established under the circumstances referred to in paragraph 8 or Article 6 [, *i.e.*, margins based on adverse-inference facts otherwise available].

See, e.g., United States Antidumping Measures on Certain Hot-Rolled Steel Products from Japan, WTO Panel Report WT/DS184/R (Feb. 28, 2001).

dated. Def's Br. at 23 (citing *Federal-Mogul Corp. et al. v. United States*, 17 CIT 442, 449, 822 F. Supp. 782, 788 (1993); *Federal-Mogul Corp. et al. v. United States*, 18 CIT 785, 801, 862 F. Supp. 384, 400 (1994)). *See also D&L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997); *Pulton Chain Co. v. United States*, 21 CIT 1290, 1292 (1997). Pre-URAA all-others rates have not been invalidated and are valid record information for use as facts available, the government argues (irrespective of any adverse-inference basis), since decisions of this Court (according to the government) regard all-others rates as non-adverse in the context of unreviewed exporters. Def.'s Br. at 23 (citing *The Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers v. United States*, 23 CIT 88, 112, 44 F. Supp. 2d 229, 252 (1999); *Borden Inc. v. United States*, 22 CIT 233, 265, 4 F. Supp. 2d 1221, 1247 (1996) (if Commerce does not draw an adverse inference, it may apply a lower rate, including an all-others rate)). Therefore, the government argues, it is logical to regard a pre-URAA all-others rate as non-adverse for purposes of facts otherwise available. Further, according to the government, all-others rates conform to the "common sense inference" that the margins determined at the LTFV investigation are the most indicative of current market conditions,[9] whereas taking Viraj's argument to its logical extreme "would prevent the application of the all-others rate against non-reviewed exporters." Def.'s Br. at 22.

However, *American Brake and Drum* and *Borden* each considered the application of an all-others rate that had been determined after the URAA took effect. They do not provide guidance on the applicability of a pre-URAA rate based on adverse inferences to a cooperative respondent reviewed post-URAA. Likewise, *Allied Signal* interpreted Commerce's permissible presumption under pre-URAA law and is not dispositive. Commerce has authority to select from among any "information or inferences which are reasonable under the circumstances as facts otherwise available for a cooperative respondent[.]"[10] But, the authority to utilize "any other information placed on the record"[11] as adverse facts otherwise available is restricted to respondents deemed uncooperative in accordance with 19 U.S.C. § 1677e(b), which Viraj was not. Post-URAA, it appears Commerce must, by definition, presume non-adversity in the case of a cooperative respondent, and the Court therefore concludes that an all-others rate based in whole or in part on adverse inferences cannot be said to constitute "non-adverse" facts otherwise available. The all-others rate was therefore an inappropriate choice of

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[9] *Allied Signal v. United States*, 996 F.2d at 1192. Commerce further states such presumption might have been overcome had Viraj simply provided the requested information within the deadlines established. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990).

[10] Statement of Administrative Action, H.R.Rep. No. 103-826(I) 656, 869 ("SAA"), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198.

[11] 19 U.S.C. § 1677e(b)(4).

facts otherwise available and the matter will be remanded for further consideration.[12]

CONCLUSION

In view of the foregoing, this matter will be remanded to Commerce for further proceedings not inconsistent with this opinion. Commerce shall have 60 days for redetermination, the parties shall have 30 days from the date thereof for commenting thereon, and 15 days thereafter for replies.

(Slip Op. 02–78)

CARNIVAL CRUISE LINES, INC., HAL ANTILLEN, N.V., HAL SHIPPING LTD., AND WIND SURF LIMITED, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–10–00691

[On remand, the Court considered Plaintiffs' arguments (1) that the Harbor Maintenance Tax ("HMT") should not be imposed on passenger cruises that begin and end at ports which are exempt from the HMT, but which make layover stops at ports covered by the HMT, and (2) that the "value" on which the HMT is assessed should only be the actual cost of transportation. Defendant argued that the Court of Appeals for the Federal Circuit decided in *Princess Cruises, Inc. v. United States*, 201 F.3d 1352 (Fed. Cir. 2000), that layover stops alone give rise to HMT liability and that this Court is bound to follow that decision. Defendant also argued that the Court should defer to Customs' rulings on the proper calculation of the "value"of the cruise on which the HMT is assessed.

Held: (1) Based on the Federal Circuit's decision in *Princess*, Plaintiffs are liable for payment of the HMT on passengers who disembark the ship at layover ports covered by the HMT, but only after the issuance of HQ 112511 (Jan. 27, 1993), which resolved the ambiguity in the statute and regulation on this issue; (2) Customs' method of calculating the "value" of the cruise fare for HMT assessment purposes is correct except for the inclusion of "port taxes," charges for "U.S. Customs and U.S. Immigration and Naturalization services," and the inclusion of charges for airfare and certain landbased services and commissions prior to 1993, which are inconsistent with the HMT statute. Plaintiff's motion for partial summary judgment is granted in part, and Defendant's motion for summary judgment is granted in part.]

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[12] Considering what would be appropriate facts otherwise available, there must be "a rational relationship between data chosen and the matter to which they are to apply." *Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619, 624, 799 F. Supp. 110, 115 (1992). *See also National Steel Corp. v. United States*, 18 CIT 1126, 1132, 870 F. Supp. 1130, 1136 (1994). On that basis, the 1994 Grand Foundry rate would be a tenuous fit as facts otherwise available. Viraj argues that the zero percent margin determined against it in 1997 is more probative of its current market conditions than other information of record, and it contends that where Commerce is unable to calculate a margin for certain sales of a cooperative respondent, it has used as facts otherwise available a weighted-average margin based on acceptable sales from the respondent's own database. Viraj's Br. at 4 (citing *Static Random Access Memory From Taiwan*, 63 Fed. Reg. 8909, 8920 (Feb. 23, 1998) *("SRAM")*). The government argues that *SRAM* was merely the initial LTFV investigation and thus "there was no higher rate from an earlier initial LTFV determination available for use." Def.'s Br. at 20. The Court fails to see the distinction. Rummaging among facts available for a "high" margin to use for a cooperative respondent would be *prima facie* results-oriented and in derogation of *Manifattura's* rational relationship test if such is not probative. *Cf. Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990) (rejecting low margin information for demonstrably less probative high margin information would be punitive BIA). Commerce may use a cooperative respondent's own data if appropriate to do so. *See, e.g., Nippon Steel v. United States*, 25 CIT ____, n.6, 146 F. Supp. 2d 835, n.6 (2001); *Mannesmannrohren-Werke AG v. United States*, 24 CIT ____, ____, 120 F. Supp. 2d 1075, 1080–1081, 1088–89 (2000).

(Dated July 31, 2002)

Paul, Weiss, Rifkind, Warton & Garrison (Robert E. Montgomery, Jr. and *Robert P. Parker)* for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Lara Levinson* and *Michael Duclos)*, and *Richard McManus*, Office of Chief Counsel, United States Customs Service, of counsel, for Defendant.

OPINION

MUSGRAVE, *Judge:* In this action, plaintiffs Carnival Cruise Lines, Inc., HAL Antillen, N.V., HAL Shipping, Ltd., and Wind Surf Limited (collectively "Carnival") contest the assessment and collection of the Harbor Maintenance Tax ("HMT")[1] on passenger cruise ships by defendant the United States Customs Service ("Customs"). This matter began in 1992 when Customs audited the HMT paid by HAL Antillen for the period from April 1, 1987 through December 31, 1991 and assessed $322,311.00 for alleged underpayments. According to an August 20, 1992 letter from the Regional Director of Customs' Regulatory Audit Division the underpayments resulted from HAL Antillen's failure to pay the HMT for cruises that made only layover stops at ports subject to the HMT and its deduction of travel agents' commissions from the "value" of the cruise fare on which the HMT was based. After receiving formal notification of the audit results on April 6, 1993, HAL Antillen filed a timely protest. On October 6, 1993 it requested accelerated disposition its protest pursuant to 19 C.F.R § 174.22(a). After receiving no decision for 30 days, the protest was deemed denied pursuant to 19 C.F.R § 174.22(d) on November 5, 1993.

Carnival commenced this action in October 1993 and an appeal from the denial of HAL Antillen's protest was added by an amended complaint. Subsequently, Carnival moved for partial summary judgment on the issues of (1) whether the HMT should be assessed on cruises that begin and end at ports that are exempt from the tax, but make layover stops at ports subject to it, and (2) whether the "value" of the cruise on which the HMT is assessed should include anything more than the actual cost for transportation. Following the Supreme Court's decision in *United States Shoe Corp. v. United States*, 523 U.S. 360 (1998), *aff'g* 114 F.3d 1564 (Fed. Cir. 1997), *aff'g* 19 CIT 1284, 907 F. Supp. 408 (1995), holding the HMT unconstitutional as applied to exports, Carnival amended its complaint a second time adding a constitutional challenge. This Court held that the HMT was unconstitutional as applied to passenger cruises; therefore it did not reach the other issues raised by Carnival. *See Carnival Cruise Lines, Inc. v. The United States*, 22 CIT 486, 8 F. Supp. 2d 877 (1998). The Court of Appeals for the Federal Circuit reversed this Court's holding on the constitutional issue and remanded this action for consideration of the remaining legal issues. *See Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361, 1369 (Fed. Cir. 2000).

[1] The HMT is a tax on port use calculated at a rate of 0.125 percent of the value of the commercial cargo. It was enacted pursuant to the Water Resources Development Act of 1986, Pub. L. No. 99-662, Title XIV, § 1402, 100 Stat. 4266 (1986), and is codified at 26 U.S.C. § 4461-62.

For the reasons which follow, the Court holds that the Federal Circuit's decision in *Princess Cruises, Inc. v. United States*, 201 F.3d 1352 (Fed. Cir. 2000), is controlling on the issue of whether cruise lines are liable for the HMT when a vessel makes a layover stop at a port subject to the HMT. Nevertheless, since the Federal Circuit found that the law was ambiguous with respect to layover stops prior to the issuance of HQ 112511 (Jan. 27, 1993), the Court holds that cruise lines are not liable for the HMT on cruises which made only layover stops at HMT covered ports prior to January 27, 1993. The Court also holds that Customs should not have included "port taxes" and charges for "U.S. Customs and U.S. Immigration and Naturalization services" in the cruise "value"on which the HMT is assessed, but was otherwise correct in assessing the HMT on the price paid for the cruise, exclusive of land-based services and commissions. Therefore, Carnival's motion for partial summary judgment is granted in part and Customs motion for summary judgment is granted in part.

I. Jurisdiction and Standard of Review

Pursuant to 28 U.S.C. § 1581(i) the Court has jurisdiction over Carnival's claim for restitution of the amount of HMT that it allegedly overpaid, and pursuant to 28 U.S.C. § 1581(a) the Court has jurisdiction over the counts in Carnival's First Amended Complaint appealing the denial of HAL Antillen's protest. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CIT Rule 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

II. Assessment of Harbor Maintenance Taxes for Layover Stops

The HMT is "a tax on any port use," 26 U.S.C. § 4461(a), and "port use" is defined as "the loading of commercial cargo on, or * * * the unloading of commercial cargo from a commercial vessel at a port," 26 U.S.C. § 4462(a)(1). "The term 'commercial cargo' means any cargo transported on a commercial vessel, including passengers transported for compensation or hire." 26 U.S.C. § 4462(a)(3)(A). Ports in Alaska, Hawaii, and possessions of the United States are exempt from the tax. 26 U.S.C. § 4462(b). Although the statute itself does not explain how the HMT is to be assessed on passengers, 19 C.F.R. § 24.24(e)(4) states that "when a passenger boards or disembarks a commercial vessel at a port within the definition of this section, the operator of that vessel is liable for the payment of the port use fee." In HQ 112511 Customs addressed for the first time the issue of whether a passenger who "temporarily goes ashore and subsequently gets back on the vessel [at a layover stop] is considered to have 'disembarked' or 'boarded' at that port for purposes of 19 C.F.R. § 24.24(e)(4) so as to incur liability on behalf of the vessel operator for the payment of a port use fee." Customs concluded that cruise operators are liable for the HMT on passengers who leave the ves-

sel at these interim stops and that there is a rebuttable presumption that every passenger does so.

Subsequently, this issue came before the Federal Circuit in an action brought by Princess Cruises. The Federal Circuit held that both 26 U.S.C. § 4461–62 and 19 C.F.R. § 24.24(e)(4) were ambiguous with regard to layover stops by cruise ships and gave *Chevron* deference[2] to Customs' interpretation of the regulation. *See Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1359 (Fed. Cir. 2000). The Federal Circuit concluded that:

> In light of the clear intent of Congress to impose a fee on all port use as revealed in the legislative history, the Customs interpretation including stopovers and layovers in the port use covered by the HMT is not unreasonable. The HMT is intended to charge those using the ports for the expense of maintaining the ports. It is not apparent to us that the use of the port to discharge passengers for shopping and sight-seeing in a port and then reboard those same passengers is any less of a use or has any less impact on the port than boarding or discharging passengers at the beginning or end of a cruise.

Id. at 1360.

In the present action, Carnival challenges Customs' assessment of the HMT for layover stops on grounds that it is inconsistent with the language of the act, the legislative history, and Customs' procedures. *See* Pl.s' Mot. for Partial Summ. J. at 13–25. Customs asserts that *Princess* is dispositive of this issue. *See* Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. and in Opp'n to Pl.s' Renewed Mot. for Partial Summ. J. at 12–13. Nevertheless, Carnival argues that *Princess* is no longer valid following the decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001), *aff'g*, 185 F.3d 1304 (Fed. Cir. 1999),[3] because the Customs ruling at issue was not adopted pursuant to the Administrative Procedure Act. *See* Mem. of Points and Authorities in Support of Pl.s' Renewed Mot. for Partial Summ. J. at 17 n.14. Therefore, Carnival concludes that the Court should consider its substantive legal arguments. Pl.s' Supplemental Mem. in Supp. of their Renewed Mot. for Summ. J. and in Opp'n to Def.'s Cross-Mot. for Summ. J. at 3–4.

The Court agrees with Customs that *Princess* is still valid precedent. Unlike the ruling in *Mead*, the ruling at issue in *Princess* did not interpret a statute, but interpreted a regulation that interpreted a statute. In *Auer v. Robbins*, 519 U.S. 452 (1997), the Supreme Court held that an agency's interpretation of its own regulation is controlling unless it is

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[2] Under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), if a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

[3] In *Mead* the Supreme Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226–27. "[R]elatively formal administrative procedure tending to foster * * * fairness and deliberation" is one of the primary indicators that an administrative action is intended to carry the force of law. *Id.* at 230.

"plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (citation omitted). *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Barnhart v. Walton*, ____ U.S. ____, 122 S. Ct. 1265, 1269 (2002). Therefore, based on the Federal Circuit's decision in *Princess*, the Court holds that Carnival is liable for payment of the HMT on passengers who disembark the ship at layover ports covered by the HMT.

As a separate issue Carnival contends that *Princess* only upholds Customs' assessment of the HMT for layover stops from the time HQ 112511 was issued in 1993 and does not address the legality of Customs' retroactive application of that ruling. Carnival argues that prior to Customs' pronouncement in HQ 112511 that all passengers were, in the absence of contrary evidence, presumed to "disembark" at layover ports, cruise line operators were not required to maintain records of which passengers went ashore and which remained aboard ship and were unaware that they needed to record such information. *See* Pl.s' Mot. for Partial Summ. J. at 23. Carnival argues that HQ 112511 announced a change of procedure for which there was no "fair notice" given and cites a number of cases from the Federal Circuit and the United States Court of Appeals for the District of Columbia Circuit including *NEC Technologies v. United States*, 54 F.3d 736 (Fed. Cir. 1995), *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995), *Creswell Trading Co. v. United States*, 15 F.3d 1054 (Fed. Cir. 1994), and *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987), for the proposition that an administrative agency cannot penalize a party for non-compliance with an administrative rule or impose a new evidentiary burden without first providing adequate notice. *See* Mem. of Points and Authorities in Support of Pl.s' Renewed Mot. for Partial Summ. J. at 11–15; Pl.s' Reply in Supp. of their Renewed Mot. for Summ. J. and Opp'n to Def.'s Cross-Mot. for Summ. J. at 26–30. Customs responds to Carnival's allegations stating:

> Customs plainly has not applied any ruling or regulation "retroactively." Carnival's method of HMT payment and the audit leading to the payments sought in this action are critical. Pursuant to regulation, cruise lines are responsible for calculating HMT owed and making quarterly HMT payments. 19 C.F.R. § 24.24(e)(3)(ii). Prior to 1993, in making these payments, Carnival interpreted the HMT statute in its favor to exclude layover stops, though the statute applies to "any port use," including "loading [and] unloading" of passengers. 26 U.S.C. § 4461 & 4462(a)(1).
>
> In 1993, Customs audited the cruise lines, and exercised its authority to collect underpayments discovered in the audit. *See* 19 U.S.C. § 1509(b); 19 C.F.R. § 24.24(h). Those underpayments include charges for layover stops. Thus, Customs' actions were not a reversal of any earlier official position, but merely its reasoned consideration of the issue presented.

Def.'s Reply to Pl.s' Reply Mem. in Supp. of Its Mot. for Summ. J. and in Opp'n to Def.'s Cross-Mot. for Summ. J. at 10–11.

The Court agrees that Carnival should not be held liable for HMT payments on cruises which made only layover stops at HMT covered ports prior to the issuance of HQ 112511. The Court concludes that general principles of tax law bear directly on this issue. In *International Business Machine Corp. v. United States,* 201 F.3d 1367, 1371–72 (Fed. Cir. 2000), the Federal Circuit determined that the HMT is an internal revenue tax. *See also Citgo Petroleum Corp. v. United States,* 25 CIT ____, 104 F. Supp. 2d 106, 107–08 (2000). The Supreme Court has held that:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen.

Gould v. Gould, 245 U.S. 151, 153 (1917) (citations omitted).[4] *See also Union Pacific Corp. v. The United States,* 5 F.3d 523, 525 (Fed. Cir. 1993) ("[T]he Supreme Court counsels to construe any reasonable doubts about the meaning of a tax statute in favor of the taxpayer."). Customs position on this matter, as stated above, is that the statute unambiguously imposes the HMT on "any port use" involving "'loading [and] unloading' of passengers." This notion is contrary to the Federal Circuit's findings in *Princess* that: (1) "the language of the statute is not clear and unambiguous about whether the HMT is to be imposed on stopovers and layovers at HMT-covered ports;" (2) "[the] legislative history provides some indication that Congress intended for the HMT to apply when a cruise ship made a stopover or layover in an HMT-covered port, [but] it is not sufficient evidence to indicate an 'unambiguous intent;'" and (3) "the regulation itself is ambiguous." 201 F.3d at 1359. Therefore, based on the precedent of the Supreme Court and the holdings of the Federal Circuit, the Court concludes that Carnival is not liable for the HMT assessed on layover stops prior to January 27, 1993, the date on which HQ 112511 was issued.

III. Calculation of the "Value" of the Cruise Fare

The statute imposing the HMT provides that "[t]he amount of the tax imposed * * * on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved." 26 U.S.C. § 4461(b). Elsewhere, the HMT statute defines the term "value" in the context of the transportation of passengers as "the actual charge paid for such service or the prevailing charge for comparable service if no actual charge is paid." 26 U.S.C. § 4462(a)(5)(B). Customs' regulation, 19 C.F.R. § 24.24(e)(4)(i), essentially follows the language of the statute, stating that "[t]he fee is to be based upon the value of the actual charge for transportation paid by the passenger or on the prevailing charge for

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[4] In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Supreme Court stated that "[w]here * * * a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means." *Id.* at 744 n.3. Although *Gould* and *Smiley* appear to conflict, this Court follows *Gould* in the present action since it deals specifically with the resolution of ambiguity in a tax statute, which is the precise issue presented.

comparable service if no actual charge is paid." In HQ 112511 (Jan. 27, 1993) Customs addressed what it "consider[ed] 'transportation costs' for purposes of 19 C.F.R. 24.24(e)(4)" stating:

> In calculating the value of the "actual charge for transportation paid by the passenger" * * * it was Customs' position that this should include those expenditures which comprise the normal fare the cruise line would charge a passenger for a particular trip, including any travel agent's commission and those transportation and lodging costs included in the overall cruise package in bringing the passenger to and from the port of embarkation, provided the passenger actually availed himself of such transportation and lodging. ([HQ] 543896, dated May 13, 1987). * * *
>
> Upon further review of this matter, Customs remains of the opinion that the "transportation costs" for passengers of cruise vessels includes all "embarkation-to-disembarkation" costs as reflected on passenger tickets, including commissions paid to travel agents, port taxes, charges for pilotage, U.S. Customs and U.S. Immigration and Naturalization services, wharfage, and "suite amenities" provided they are contracted and paid for prior to the commencement of the voyage (*i.e.*, included in the cost of the ticket). However, after numerous discussions with representatives of the cruise industry, Customs is now of the opinion that the costs of land-based lodging and connecting air transportation are not to be included in Customs' calculation of the transportation costs under consideration regardless of whether a passenger avails himself of such transportation and lodging. Although this position represents a divergence from [HQ] 543896 cited above, Customs believes this revised position constitutes an equitable resolution of this matter. * * *

In HQ 112844 (Oct. 28, 1993) Customs reaffirmed its conclusions in HQ 112511 except with regard to travel agents' commissions, on which it concluded that:

> [T]he inclusion of the entire amount of a travel agent's commission in the calculation of the aforementioned transportation costs without regard to whether any portion of such commission is attributable to the costs of land-based lodging and connecting air transportation is inconsistent with our position that the transportation costs include all "embarkation-to-disembarkation" costs. Accordingly, accurate apportionment of travel agents' commissions clearly distinguishing that portion of the commissions attributable to land-based lodging and connecting air transportation will result in the exclusion of any such costs from Customs' calculation of the "value of the actual charge for transportation paid by the passenger" for purposes of [19 C.F.R. §] 24.24(e)(4).

Carnival argues that Customs' interpretation is inconsistent with the statute, relevant caselaw, and the Internal Revenue Service's interpretations of similar taxes, and contends that charges for services, amenities, and "pass through" charges should be excluded from the fare amount on which the HMT is imposed. *See* Pl.s' Mot. for Partial Summ. J. at 27–37. Customs, on the other hand, argues that the Court must defer to its interpretation of the statute. *See* Def.'s Mem. in Supp. of its

Cross-Mot. for Summ. J. and in Opp'n to Pl.s' Renewed Mot. for Partial Summ. J. at 4–8.

The Court concludes that when the disputed language is read in the context of the entire statute, the intent of Congress is clear.[5] One of the fundamental aspects of the HMT is that it is assessed based on "value" rather than tonnage or simply as an equal assessment on all vessels using a port. In the case of commercial cargo, a shipment of gold would be charged more HMT than a shipment of lead. Therefore, when 26 U.S.C. § 4462(a)(5)(B) defines "value" in the context of the transportation of passengers for hire as "the actual charge paid for such service" it follows that the phrase "such service" refers to the shipboard service that the passenger is buying. In the case of a cruise, the passenger is buying services and amenities as well as transportation. Calculating the HMT on basic transportation costs alone would essentially render the tax a flat fee assessed per passenger.

It is also consistent with the statute to include the percentage of any travel agent commission that is attributable to making shipboard arrangements as part of the overall shipboard service. Nevertheless, it is inconsistent to include, as Customs has, port taxes and Customs and Immigration and Naturalization Service charges in the cruise "value." While these are passed along to the passenger as part of the cruise fare, they are not part of the cruise service, but are additional charges imposed by the relevant government agencies. Thus the Court concludes that the HMT for passenger cruise ships is properly calculated based on the costs included in the cruise fare, excluding costs for air transportation to the port of embarkation and land-based services, the percentage of travel agents' commissions attributable to the air transportation and land-based services, port taxes, and Customs and Immigration and Naturalization Service charges. Accordingly, Carnival is entitled to a refund to the extent that it paid the HMT on amounts that should have been excluded from the cruise "value."

IV. Conclusion

For the forgoing reasons Carnival's motion for partial summary judgment is granted in part as to (1) the retroactive application of HQ 112511, regarding the assessment of the HMT for layover stops, (2) the inclusion of "port taxes" and charges for "U.S. Customs and U.S. Immigration and Naturalization services," and (3) the inclusion of charges for airfare and certain land-based services and commissions prior to the issuance of HQ 112511 and HQ 112844. Customs' motion for summary judgment is granted as to all other issues presently before the Court.

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[5] "Where the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. 837, 842 (1984).

The parties shall confer with each other (i) in an effort to reach a stipulation on the amount of a final judgment in this matter and (ii) regarding such additional proceedings as may be necessary in this action, and shall submit a status report to the Court on the results of their conference within 60 days.

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